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VOLUME III.

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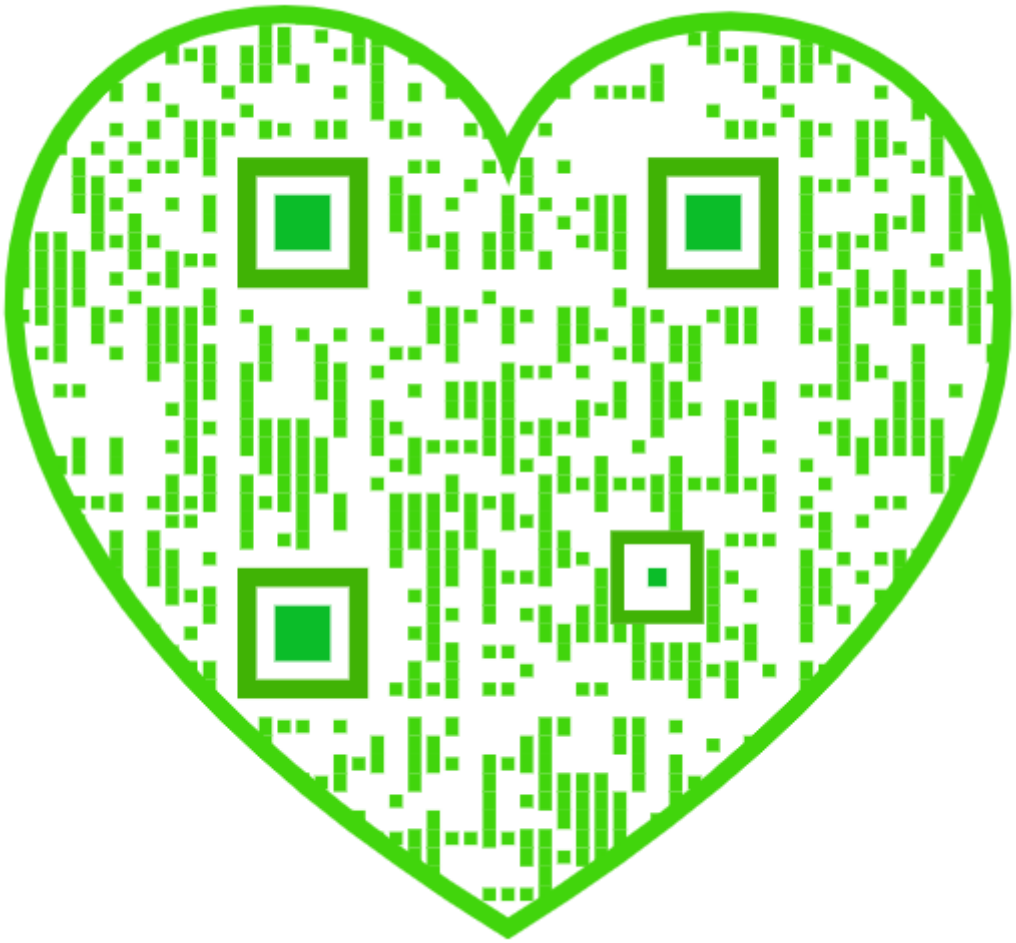

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CRIMINAL LAW

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§ 1. Outline. This article will consist of the following topics: Part I. 1. The sources from which our criminal law is derived. 2. Of crimes in general: (A) the nature of a crime; (B) the essential intention; (C) the criminal act. 3. The parties to a crime. 4. Jurisdiction of crimes. Part II. Some rules concerning particular crimes considered in the following classes: 1. Crimes against the person. 2. Crimes against the habitation. 3. Crimes against property. 4. Crimes against the public peace and welfare (public morals, health, safety, and comfort). 5. Crimes against the administration of public justice and authority. 6. Treason and piracy.

PART I.

GENERAL PRINCIPLES.

CHAPTER I.

THE SOURCES FROM WHICH OUR CRIMINAL LAW IS DERIVED.

§ 2. **Sources of our criminal law in general.** Our criminal law is derived from the following sources: 1. The criminal law of England as it existed at the time of the settlement of this country, which our forefathers are said to have brought with them, the law of their mother country being esteemed by them their choicest possession; or, otherwise stated, they were subject to the law of their country and continued so subject when they moved to the new colony. 2. Parts of the English law have been deemed not applicable in this country, because not suitable nor adapted to our institutions and national ideals, wherein these differ from those of England. 3. Additions have been made to this law by customs that have grown up in this country, as a continuation of the growth of custom which was the origin of the law of England—the common law. 4. Further additions to our law have been made by statutes from time to time, enacted by the various legislatures for their several jurisdictions. To restate the above, the English law consisted of ancient universal custom plus the laws enacted by

Parliament. Our law consists of that ancient custom plus the old English statutes as the two existed at the time of the settlement of this country, less such parts as were foreign to our national ideals. To this original body of our criminal law we have since added by American customs, common law, and statutes; and these to a certain extent have also abrogated and displaced part of the law which we obtained from the mother country.

§ 3. **Crimes against the United States.** There are no common law crimes against the United States, because the United States government is a government of derivative powers. It has no powers except those expressly or impliedly given to the United States government by the several states in the Constitution of the United States. On the other hand, the states have all the powers which they have not given to the United States government by that Constitution, or are not by it forbidden to exercise, except as they are further restrained by their own particular state constitutions. The acts which were crimes at common law, therefore, are not crimes against the United States, unless made so by the Constitution or some act of Congress enacted in the exercise of powers given to Congress by the Constitution. Therefore an act which would be a crime at common law in England, or by a statute of England enacted before the settlement of this country, would be a crime against the state in which the act is committed and could be prosecuted in the courts of that state, unless the law had been changed there by its constitution or some statute. But such an act would not be a crime against the United States unless it had

been made a crime by the Constitution of the United States or some valid act of Congress. For example, at the time of the trouble between the United States and France, in the administration of President Madison, a publisher of a paper in Connecticut printed an article in his paper charging that the President and Congress had secretly voted a tribute to Napoleon. For this act the publisher was indicted in the United States courts on a charge of criminal libel against the President and Congress. It was thought this was a crime against the United States because it might seriously affect the administration of the national government and the popular support of the government, and bring the national officers into general contempt and disrepute. The defendant denied the jurisdiction of the United States courts to entertain the prosecution because, admitting the act to be a criminal libel, it was not a crime against the United States, but a crime against the state in which the paper was printed, even though it might be injurious to the United States government. And his reason was that there are no common law crimes against the United States—no crimes except those which have been created by some valid act of Congress; and inasmuch as there was no act of Congress declaring it to be a crime against the United States to libel an officer of the government, therefore no crime against the United States was charged in the indictment. This defense was sustained by the United States Supreme Court. The court admitted that if the act was one which might endanger the efficient administration of the national government, Congress would have implied power

to make that act a crime against the United States. But, inasmuch as Congress had not yet declared it criminal to libel the President, the act charged, if a crime at all, was a crime against the state where the paper was published, and not a crime against the United States (1).

§ 4. **How the common law supplements acts of Congress on crimes.** When Congress does enact that an act shall be a crime, that statute is read in the light of the pre-existing law. The whole common law can be invoked to ascertain the true meaning and effect of that statute. For example, when a man was charged with piracy as a crime against the United States, by virtue of the act of Congress of March 3, 1819, and was brought to trial in a United States court, he alleged in his defense that there was no act of Congress defining piracy. The judges of the circuit court in which he was brought to trial, being divided in opinion as to the validity of the defense, the question was certified to the United States Supreme Court, and Mr. Justice Story, speaking for the court, said: "The argument which has been urged in behalf of the prisoner is that Congress is bound to define in terms the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by counsel that it equally applies to the act of Congress of 1790, Chap. 9, Sec. 8, which declares that robbery and murder committed on the high seas shall be deemed piracy. . . . When the act of 1790 declares that any person who shall commit the crime of robbery or murder on the high seas

(1) United States v. Hudson, 7 Cranch. 32.

shall be deemed a pirate the crime is not less clearly ascertained than it would be by using the definition of the terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where 'malice aforethought' is of the essence of the offense, even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of 'malice aforethought' would remain to be gathered from the common law. There would then be no end to our difficulty or our definitions, for each would involve some term which might still require some new explanation. Such a construction of the Constitution is therefore wholly inadmissible. To define piracy, in the sense of the Constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted. It is next to be considered whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. . . . It is to be certified to the circuit court that upon the facts stated the case is piracy as defined by the law of nations, so as to

be punishable under the act of Congress of March 3, 1819" (2).

§ 5. **Common law crimes against the states.** In further exposition and illustration of the statement made above, that acts which were crimes in England at the common law are crimes against the state here, a case which arose in Massachusetts is quite instructive. One Warren was indicted for deceit, cheating, and fraud, in that he obtained fifty pairs of shoes on credit by falsely pretending that he had good credit, kept a store at Salem, and his name was Waterman. After conviction he moved to arrest judgment against him on the ground that the indictment charged no offense. The motion was granted because: 1. The defendant being alone, no conspiracy was charged. 2. There was no pretense that false weights or measures were used, which would make the act the common law crime of cheating. 3. No false tokens were used to obtain the credit, which would be punishable by the statute of 33 Henry VIII, c. 1, which is a part of our common law, having been enacted before the settlement of Massachusetts. The only ground for claiming that there was a false token was the fact that Warren had signed his name to a note for the price at the time of obtaining the shoes, and had signed "William Waterman"—which the court held was not a "false token." 4. The statute of 30 George II, c. 24, which makes obtaining goods by false pretenses indictable was not in force in Massachusetts, because it was enacted after the settlement of that colony. It is clear that if

(2) United States v. Smith, 5 Wheat. (18 U. S.) 153.

obtaining goods by false pretenses had been a crime at common law, or by an English statute enacted before the settlement of Massachusetts, or by any statute of Massachusetts enacted before the defendant obtained the goods, he could have been convicted of obtaining goods by false pretenses; for clearly his statement that his name was Waterman (designed to prevent his subsequent discovery) and that he kept a store in Salem (designed to induce a belief that he was worthy of credit) were false statements of fact which would constitute a false pretense under such statutes (3).

§ 6. **Common law not suitable to our institutions.** As an example of a case in which an act which was a crime by the common law of England would not be criminal here, the reader is referred to that large group of cases in which the crime consisted of non-conformity to the established religion, which could not be law here, because we have no established church. An actual case might make the point clearer. Nancy James was convicted of being a common scold and was sentenced to be placed on a ducking stool and plunged three times in the river. She claimed that the judgment was illegal and appealed to the higher court, in which her contention was sustained, the court saying: "This sentence, we are informed, has created much ferment and excitement in the public mind. It is considered as a cruel, unusual, unnatural, and ludicrous judgment. But whatever prejudices may exist against it, still, if it be the law of the

(3) Commonwealth v. Warren, 6 Mass. 72.

land, the court must pronounce judgment for it. But as it is revolting to humanity, and is of that description which could only have been invented in an age of barbarism, we ought to be well persuaded that it is the appropriate judgment of the common law, or is inflicted by some positive law; and that that common law, or statutory provision, has been adopted here, and is now in force. . . . The sanguinary code of England could be no favorite with William Penn, and his followers, who fled from persecution. Cruel punishments were not likely to be introduced by a society who denied the right to touch the life of man, even for the most atrocious crime. For had they brought with them the whole body of the British criminal law, then we should have had the appeal of death, and the impious spectacle of trial by battle in a Quaker colony. . . . The common law punishment of ducking was not received nor embodied by usage so as to become a part of the common law of Pennsylvania. It was rejected, as not accommodated to the circumstances of the country, and against all the notions of punishment entertained by this primitive and humane community; and though they adopted the common law doctrines as to inferior offenses, yet they did not follow their punishments. One remarkable instance I will notice. A gross libel in England was sometimes punished by the pillory; I believe Mr. Prynne lost both his ears. Though the offense is the same here, yet the sentence is very different. It is not true that our ancestors brought with them all the common law offenses; for instance that of champerty and maintenance this court decided did

not exist here. . . . I am far from thinking this is an unbroken pillar of the common law, or that to remove this rubbish would impair a structure which no man can admire more than I do. But I must confess I am not so idolatrous a worshiper as to tie myself to the tail of this dung-cart of the common law" (4).

§ 7. Changes by statute of the state. As before intimated, changes by the statute of the state may be by making acts criminal which were not so before, by increasing the punishment, by making acts innocent which were criminal by the old law, etc.; and these changes may be made by express provision or clear implication. A case decided in Minnesota will illustrate this point. Defendant, being convicted of conspiracy to assault, appealed on the ground that a statute had abolished this common law offense. The court said: "That our statutes expressly abolish common law offenses is not pretended. A statute which is clearly repugnant to the common law must be held as repealing it, for the last expression of the legislative will must prevail. Or we may admit for the purposes of this case, that when a new statute covers the whole ground occupied by a previous one, or by the common law, it repeals by implication the prior law, though there is no repugnancy. Beyond this the authorities do not go in sustaining a repeal of the common law by implication. On the contrary it is well settled that where a statute does not expressly repeal or cover the whole ground occupied by the common law, it repeals only

(4) James v. Commonwealth, 12 S. & R. (Pa.) 220.

when and so far as directly and irreconcilably opposed in terms. See 1 Bishop Cr. Law (3d ed.) §§ 195-200, and cases cited in notes to said sections. Our statutes fall far short of covering the whole field of common law crimes. It is not pretended that conspiracy is by them made a crime, and we think it very clear that libel is not, and many other instances might be added. We think, therefore, that they do not by implication abolish these crimes" (5).

§ 8. **Restraints by the Constitution of the United States.** Without attempting to enumerate all the cases in which constitutional restraints exist, the reader is reminded of the provision that "No state shall . . . pass any bill of attainder, ex post facto law," etc. (6), and the provision in the Fourteenth Amendment that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of its laws" (7). The principal questions that have been argued in the courts on these provisions have related to the expression "due process of law." This provision is a paraphrase of the provision in the Magna Charta of King John, that: "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or any ways destroyed; nor will we pass upon him, nor will we send

(5) State v. Pulle, 12 Minn. 164.
(6) U. S. Const., Art. I, Sec. 10.
(7) Amendment XIV, Sec. 1.

upon him, unless by the lawful judgment of his peers or by the law of the land."

The state having enacted a law providing that the manufacture and sale of intoxicating liquors within the state, except for medical, scientific, and mechanical purposes, shall be a misdemeanor, and that all places where such liquors are manufactured, sold, or given away, are common nuisances, which should be abated as such, it was held that this law did not deprive the defendant of his property without due process of law within the meaning of the amendment above referred to, although he had invested his money in a plant to manufacture liquor before the law was enacted, and the beer, for the selling of which he was prosecuted, was made by him before the enactment of that law (8). Again it was held that a law forbidding the manufacture and sale of any oleaginous substitute for butter and declaring void all contracts made in violation of the law was a legitimate exercise of the police power of the state in the protection of health and prevention of fraud, and that the Fourteenth Amendment was not designed to interfere with the exercise of such powers by the state (9).

A law enacting that a person who should practice medicine or surgery without first obtaining a license from the state authorities to do so should be deemed guilty of a misdemeanor, was held not to infringe this amendment by abridging the privileges or immunities of citizens of the United States (10).

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(8) Mugler v. Kansas, 123 U. S. 623.

(9) Powell v. Pennsylvania, 127 U. S. 678.

(10) People v. Phippin, 70 Mich. 6.

CHAPTER II.

CRIMES IN GENERAL. NATURE OF A CRIME.

§ 9. **Crime defined.** A crime is a wrong done to the whole public, and so flagrant in its nature that the state will take notice of it to prosecute the offender in a proceeding in its own name and punish him for his act.

§ 10. **A wrong.** From the statement that it is a wrong done, the reader must not suppose that it is essential to a crime that the act be in its nature essentially wicked, immoral, or actually injurious. On the contrary it may be wholly innocent, pious, and actually beneficial to the general public, and be criminal nevertheless. It is enough that the law-making body has declared the act to be criminal and punishable. An instance of an act innocent in itself and yet made criminal by statute, is the case already cited of prescribing medicine for the sick without previously obtaining a license from the state to do so. An instance of a pious act made punishable by statute is furnished by the case of the "peculiar people," whose faith is based on the General Epistle of St. James, c. 5, v. 14-15, as follows: "Is any sick among you? Let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord; and the prayer of faith shall save the sick; and the Lord shall raise him up; and if he have committed sins, they shall be forgiven him." Because of this pious

faith, these people think it is a manifestation of lack of faith to call a physician, and therefore wicked. After a law had been enacted, making it a misdemeanor not to call a physician in certain malignant diseases named, a child of the defendant was taken with one of the diseases mentioned, and he merely called in a woman of his sect, who prayed over the child and anointed it with oil, until it died. When he was indicted for violation of the statute, and alleged his religious scruples against calling a physician, this was held to be no excuse (1). In another case, which came before the Supreme Court of the United States, the defendant was indicted for bigamy in violation of the statute; to which he replied that he was a Mormon in faith, and a part of his religion was that it was his duty to marry as many women as he could support; but these facts were held to be no excuse (2).

If the criminal act is done it is none the less punishable because no injury actually resulted in the particular case. For example, it would be no defense to a charge of offering a bribe, that it was not accepted.

§ 11. **Moral wrongs.** People often say that this or that is a crime, because they think it is wicked or injurious. But it is not the wickedness or injuriousness of the act that makes it criminal. It may be very wicked to be disrespectful to our parents and superiors, not to pay our honest debts, to destroy our own property, and so forth, but it is not on that account criminal unless it has been declared punishable by statute or decision of

(1) Regina v. Downes, 13 Cox Cr. Cas. 111.
(2) Reynolds v. U. S., 98 U. S. 145.

the courts. Yet if the court sees in it a positive injury to the public, a criminal prosecution may be sustained, though no statute nor prior decision can be found declaring it criminal. A prosecution for using obscene language in public was sustained, though no prior decision or statute on the point could be found. The court said: "If the case stated in the indictment falls within the operation of clear, well defined, and well established principles of law, is it to be urged against the maintenance of this prosecution that no similar case has heretofore occurred, calling for the like application of such principles? Surely not at this day." (3)

§ 12. **Must be criminal at the time.** An act cannot be punished as a crime by reason of any statute enacted after the act charged was done, nor unless it continues to be the law at the time of the trial, judgment, and punishment. On indictment for disinterring a dead body, judgment against the defendant was arrested on motion after verdict; and the reason was thus stated by Chief Justice Shaw: "If the law ceases to operate by its own limitation or by repeal, at any time before judgment, no judgment can be given. Hence, it is usual, in every repealing law, to make it operate prospectively only, and to insert a saving clause preventing the operation of the repeal and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed. These principles settle the present case. By the statute of 1830, c. 57, § 6, that of 1814 was repealed without any saving clause. The act charged upon the defendants as an offense was

(3) Bell v. State, 1 Swan (31 Tenn.) 42.

done after the passing of the statute of 1814, and before that of 1830. The act cannot be punished as an offense at common law, for that was not in force during the continuance of the statute; nor by the statute of 1814, because it has been repealed without any saving clause; nor by the statute of 1830, for the act was done before that statute was passed." (4)

§ 13. **Must be criminal act done.** No mere secret intention, wholly unexecuted, no matter how criminal, will constitute a crime. There must be a criminal act done. If in passing along the street I design to steal money from the pockets of the passersby, and positively determine upon it, no crime is committed. If I put my hand into the pocket of a passerby, with the design of taking what is in the pocket, this is a criminal act done, though there be nothing in the pocket to steal. The crime is not larceny, but attempt to commit larceny. Moreover, the act done must be a criminal act. If I design to steal an umbrella and go into the cloak room for that purpose, and finding an umbrella there run away with it, with the design of stealing it, nevertheless no crime has been committed if it turns out in the end to have been my own umbrella. An actual case will illustrate this point. A man was prosecuted for obtaining money by false pretenses, of which crime one of the essential ingredients is the making of a false pretense. The allegation in the indictment was, that, designing to cheat and defraud, he falsely represented that a certain piece of property belonged to him and was free

(4) Commonwealth v. Marshall, 11 Pick. 350.

from incumbrance, and obtained a loan on that statement. The proof was that he had given a mortgage upon the property to another creditor. But as he had misdescribed the property in the prior mortgage, so that it did not create an incumbrance upon the property, the statement he had made that the property was his and unincumbered was true; and so no crime had been committed, although he supposed the statement was false, and designed to deceive and defraud (5).

§ 14. Act may be mere criminal omission. From the statement that a crime is a wrong done, the reader must not suppose that a positive act is essential to make a crime. The act may be either positive or negative. A neglect of duty may be just as criminal as a positive act. But to make a person liable criminally for neglect there must be either a reckless doing of some positive act, perhaps innocent enough in itself if carefully done, such as riding in an automobile on a public street, or there must be a positive duty to act which is criminally neglected.

This duty to act may arise from express contract, as in the case of one who engages to watch at a switch and turn it on the approach of passing trains, and who, in criminal neglect of his duty, fails to turn the switch as he should, from which injury results; or the duty may arise from the relation which the defendant bears to the person suffering from his neglect, though that relation may have arisen without any contract between the parties. For example, the parent owes a duty to protect his child from danger and provide it with necessary

(5) State v. Garris, 98 N. C. 733.

clothing, food, etc., while it is too young to provide for itself; and if he neglects to provide for it, having ability to do so, due to which neglect it dies from starvation or exposure, he is liable criminally for the death. It has even been held that a woman living with her aunt and provided for by her aunt's charity, bore such a relation to the aunt, as a result, that she was liable for manslaughter in neglecting to take food to the aunt and attend her while she was prostrated in the house so that she could not procure food for herself, from which neglect she died of starvation and exposure, while the niece lived in the house upon her means, and neglected to wait upon her or inform the neighbors of her condition (6).

§ 15. **Must be duty neglected.** But in order to convict of crime by neglect there must be proof of an act negligently done, or of a positive duty omitted. If every person, whether employed in that capacity or not, were bound at his peril to guard against every danger to which anyone might be exposed, to rush in and adjust every piece of machinery which to him might look dangerous, though beyond his understanding, the results would be worse than if every man were bound to perform his own duty, and all others were excused. It may be a matter of debate whether inaction in the face of manifest danger to a stranger should not be made a crime; for example, whether a passenger on a boat seeing another fall overboard and making no attempt to rescue, should not be punished criminally for his inaction. But if a passenger were attempting to rob another, or do him

(6) Queen v. Instan, (1893) I Q. B. 450.

some bodily harm, and the deceased, in attempting to escape from him, should jump or fall into the sea, the wrong which the assailant has done perhaps imposes a duty on him to rescue the man overboard, and for this neglect he would perhaps be liable criminally. Yet it was held in a recent case in Michigan that a man was not liable for homicide who saw a woman with whom he had maintained illicit relations take a dose of poison with suicidal intent, and made no attempt to prevent her taking it, or to call a physician to save her life after she had taken it. The reason given was that he owed her no duty, as he would his wife or child (7).

§ 16. Negligent action distinguished from lack of discretion. If one does the best he knows how he is not liable criminally, though persons of ordinary discretion would have known better than to do as he did, unless the law positively prescribes what shall be done, as in the case referred to above, of the statute requiring a physician to be called when any of the family is afflicted with certain diseases named (8). Before that statute was passed a man of the sect of "peculiar people" was indicted for mistreating a sickly child by anointing it with oil and praying over it until it died; but the court held that he was not liable criminally for his lack of discretion, the treatment being what he supposed was best for the child. Any other rule would make him liable, not for the lack of wisdom in his course of treatment, but according to the opinions of the people among whom he

(7) People v. Beardsley, 150 Mich. 206.
(8) § 10, above.

lived and before whom he was brought to trial (9). A ship was caught in a storm at sea, one of the sailors was aloft a hundred feet in the rigging; a flying yard-arm knocked him into the sea; the captain was informed, but made no attempt to rescue him, and on reaching shore was indicted for manslaughter. The court held that if the captain believed that turning about to rescue the sailor would endanger the safety of the crew, and therefore neglected to attempt rescue, he was not liable, however erroneous his judgment on this point (10).

§ 17. **Liability for remote and indirect consequences.** From the statement in the definition above, that a crime is a wrong done, it must not be assumed that the accused is liable criminally only for the direct, manifest, and immediate consequences of his act. The rule on this subject is, that the accused is liable not only for the act he intended to do, but for all the results that flow as a natural and probable consequence from it. If I do a wrong to another I am liable for the natural consequences, although my wrong would not have resulted so seriously but for facts I did not know. A man afflicted with heart disease was assaulted and beaten by the accused, who did not know of the heart disease. The assault upon the deceased in his diseased condition resulted in death from heart failure, and the accused was held liable for manslaughter, although the assault would not have resulted in death to a healthy person (11). Where death resulted from a wound and subsequent in-

(9) Regina v. Wagstaffe, 10 Cox Cr. Cas. 530.
(10) United States v. Knowles, 26 Fed. Cases, 800.
(11) State v. O'Brien, 81 Iowa 88.

fection with gangrene by reason of maltreatment, it was held that the defendant was liable for manslaughter, though the wound would not have been fatal if it had been properly treated; and the court said, in speaking of the rule above stated: "A different rule would tend to give immunity to crime, and to take away from human life a salutary safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and diseases it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crimes might escape conviction and punishment" (12).

One was held liable for murder on proof that he shot his brother-in-law, and the injury caused a temporary insanity which induced the brother-in-law to commit suicide (13). Rioters were held not liable for murder of one of their number who was shot by the police in an attempt to restore order; for the act was not done by one acting in concert with the rioters, but by their opponents (14). But when train robbers seized the engineer and held him as a body-guard between them and the messenger in the express car, to protect them in their effort to rob the express car, they were held liable for murder when the engineer was killed by a shot fired by the messenger in the express car in an attempt to drive off the robbers. This case was distinguished from the case above on the

(12) Commonwealth v. Hackett, 2 Allen 136.

(13) People v. Lewis, 124 Cal. 551.

(14) Commonwealth v. Campbell, 7 Allen 541.

ground that the defendants wilfully exposed the deceased to a place of danger for the purpose of enabling them to accomplish their crime (15). If a person is doing a lawful act he is not liable for a wrongful act of another provoked by his lawful act, though he knew that his act might provoke the other. The members of a salvation army were held not liable for a breach of the peace resulting from their marching down the street, though they had been informed that their attempt to march would be opposed and might result in a breach of the peace (16).

§ 18. What wrongs are sufficiently public to be criminal. There is such a variety of wrongs and gradual shading off of injurious consequences to the public from wrongs done, that it is difficult if not impossible to lay down any positive rule as to what wrongs are sufficiently gross to merit the attention of the state and deserve criminal punishment, and what should be left to be redressed by a private action of the person injured against the wrongdoer. As cases along the border line, may be mentioned petty malicious acts, frauds, nuisances, and immoral conduct. As to frauds, the old doctrine was that a man could be punished criminally for all cheats against which common prudence could not guard, such as using false weights and measures; but not for obtaining credit by lies, and the like; but this rule has been changed by statute, because experience has shown that the simple-minded are the easiest dupes of the rogue, and most in need of protection. As to nuisances, the law is and al-

(15) Taylor v. State, 41 Tex. Crim. App. 564.

(16) Beatty v. Gillbanks, 5 Cox Crim. Cases 138.

ways has been, that they are not criminal if they affect only certain individuals rather than the public. As to immoral conduct the courts were formerly much more lax than they are now. Publishing indecent and obscene language was once held not to be criminal; but the courts discovered the error and held later that publishing obscene books or pictures were common law misdemeanors like indecent exposure of the person in public; and these cases have also been regulated by statute. Malicious destruction of property, unaccompanied by any breach of the peace or occasion for fear, such as breaking the windows of a vacant house without making any disturbance, were not criminal in the absence of statute upon the subject. But if the act done manifested cruelty, such as torturing a domestic animal to death through spite, or was done in such a threatening way as to cause alarm to persons in the community generally, the act was criminal though it principally affected only one family or person.

§ 19. **Criminal prosecution distinguished from police administration.** A man may be guilty of a wrongful act, warranting the interference by public officials, without being guilty of any crime, and statutes are frequently enacted concerning such cases. The act of Congress of May 5, 1892, provided that Chinese persons coming into the United States should be imprisoned at hard labor for a period not exceeding a year and thereafter removed according to the provisions of the act. This was held not to be a criminal statute and not to contemplate a criminal prosecution, nor any complaint in court, in so far as the act contemplated that the officers should seize any

person found violating the act, and imprison him so that he could not get away till he could be safely deported. But in so far as he was to be confined at hard labor this was criminal punishment and must be preceded by conviction of crime after a jury trial (17).

§ 20. **How defenses may differ from those to actions for private wrongs.** A criminal prosecution is for the purpose of punishing the accused, in order that he may be restrained from repetition of the act by fear of further punishment; that he may be an example to others who may be tempted to do wrong; and that he may be confined or disposed of to protect the public from him. The criminal prosecution is for the purpose of punishing, the private action is to obtain redress and satisfaction. The criminal prosecution is for the wrong done to the public, the private action is for the wrong done to the individual. The same act may be both a private wrong and a crime, for which the injured person is entitled to a private action for redress and the guilty party is liable to a criminal prosecution in the name of the state. For example, if a man steals my horse, I have a civil action against him to recover the horse or its value, and the state can maintain a criminal prosecution against him to punish him for the crime, which is the wrong done to the state by the same act.

From these facts it naturally results that no forgiveness by me of his wrong will excuse him when prosecuted criminally; no compensation he can make me for the injury done will excuse him when prosecuted crim-

(17) Wong Wing v. U. S., 163 U. S. 228.

inally; no judgment rendered either for or against him in my action for compensation will be a defense when he is prosecuted criminally for the same act; nothing of which I may have been guilty in the same transaction will excuse him for his crime; no negligence of which I have been guilty will excuse his negligence when prosecuted criminally; and no consent by me to the act he did, before it was done, will excuse him from criminal prosecution, unless the gist of the crime consisted in the fact that it was done without my consent, as in cases of larceny, rape, etc.

§ 21. **Negligence of victim.** Where the injury has resulted from the negligence of the accused, the defense has often been made that the person injured was equally negligent. In a civil action for redress by the person injured it would be a good defense to prove that if he had not been negligent himself he would not have been injured; but as the criminal prosecution is by the state for the injury to the state; and the state is not responsible for the negligence of either party, it is held that contributory negligence is no defense. One was held liable for manslaughter in recklessly running over a man in a dark street, though the deceased was deaf and walking in the middle of the road (18).

§ 22. **Guilt of the victim.** Occasionally judges have forgotten that the criminal prosecution is to punish the offender, not to redress the victim; and, therefore, have held that the guilt of the victim is a defense. But these

(18) Queen v. Longbottom, 3 Cox. Crim. Cases 439.

decisions are clearly wrong, and are generally so considered; for if the guilt of the victim were a defense all the rogue would need to do to plunder with impunity would be to devise a scheme by which he would induce his intended victim to think that he was about to defraud somebody. The result would be a double injury to the public. Many who would not think of doing wrong would be led to crime, and the plundering of the public would become a legitimate business. The green-goods man could safely play his game, because his victim designed to pass the bad money on the public. To adopt this policy would give free license to villains and sharpers to prey upon those who are credulous through the infirmities of age, or the inexperience of youth, as well as a large class who are weak-minded by nature—the very part of the community whom it is the policy of the law to protect. For these reasons it is now generally held that the guilt of the victim is no defense of the accused. That both deserve punishment is no reason why either should escape.

§ 23. **Entrapping criminals.** Many times it is difficult or impossible to convict one constantly violating the law, unless someone is sent to procure a violation, for the reason that those who know of the transactions will neither complain nor testify concerning them. An instance of this kind is furnished in the common case of the sale of liquor without a license, on a holiday, to a minor, and so forth. That the person to whom the liquor was sold came and purchased it for the sole purpose of

convicting the defendant of an illegal sale, is no defense (19).

§ 24. **Consent as a defense.** Consent by the person injured is a common defense to criminal charges of various kinds. Concerning this defense it is necessary to observe whether the act done was the act consented to, and whether the act if consented to would still be criminal. If the charge is rape, genuine consent would be a defense, because lack of consent is an essential element of the crime. But in such crimes when consent is the defense, it may be that the woman violated lacked the mental capacity, from youth or simple-mindedness, to consent, or that she consented to one thing and he did another, in either of which cases no consent is made out sufficient to constitute a defense. The doctor who tells his patient that he will treat her with instruments and who takes advantage of her consent to such treatment to have carnal connection with her without her knowing what he is doing, is as guilty of rape as if he had overpowered her will by force. For the same reason, some courts have held that if a man obtains sexual intercourse with a woman by impersonating her husband he is guilty of rape; because she only consented to intercourse with her husband, a lawful act, and he has committed another act—adultery. But if consent was actually obtained to the act which was done, it is a good defense, though it may have been obtained by a false promise to marry or fraudulent representation that the accused was a single man. In prosecutions for larceny where the defense is consent, and the proof is that a decoy

(19) People v. Curtis, 95 Mich. 212.

was set to entrap the accused, no consent is made out unless there is a direct invitation to the accused to take the property. If a detective says to the suspect: "Let us rob that store," goes with the suspect, opens the door, and hands him the goods, the detective being the agent of the owner, his consent is the owner's consent, and no crime is proved. But when the city marshal, suspecting pick-pockets, disguised himself, feigned drunk, staggered about the streets, and fell down in an alley, till the defendants came and took the money from his pockets, the court held that this conduct was no consent and that the defendants were guilty (20).

§ 25. **Classes of crime.** As to the enormity of the offense, crimes at common law were divided into three classes, treason, felony, and misdemeanor. The principal practical problem of today has to do with the method of distinguishing between felonies and misdemeanors. At common law a felony was a crime as a result of which the criminal's goods were forfeited to the king, and most, if not all, felonies were punishable with death. Today we have no forfeiture of goods for felony, and the death penalty is generally abolished; and therefore it is difficult today to determine exactly in each case whether the crime is a felony or not. If it is an old common law crime, which was considered a felony before forfeiture and death penalty were abolished, it is generally considered a felony now; but as to a large class of crimes created by modern statute, there seems to be no positive rule to apply, in the absence of an express statute upon the point.

(20) People v. Hanselman, 76 Cal. 460.

And therefore, in a number of states, the legislatures have enacted that crimes punishable by imprisonment in the state penitentiary shall be deemed to be felonies, and all lesser offenses are misdemeanors. Where the same act constitutes two crimes, for example, assault and robbery, the assault being a misdemeanor and the robbery a felony, the lesser offense is merged and drowned in the greater, and the culprit can be convicted only of the greater offense on a prosecution for this. But because this rule has often resulted in the miscarriage of justice, statutes have been passed in a number of states providing that proof of the greater shall not prevent conviction on a charge of the lesser offense, and that on a prosecution for a greater offense, including a lesser, the jury shall have power to convict of the lesser offense on the charge of the greater. But in the absence of such a statute, there could be no conviction of the lesser offense on these facts; because the accused is entitled to be informed of the offense of which he is charged and cannot be convicted of one offense on the prosecution for another.

§ 26. **Merger of civil remedy in the crime.** The doctrine that all civil remedies in favor of the party injured by a felony, are, as it is said in the earlier authorities, merged in the higher offense against society and public justice; or, according to the later cases, suspended until the termination of the prosecution against the offender, was the well-established rule of the law in England, and seems to have had its origin there at a period long before the settlement of this country by our English ancestors. The source whence the doctrine took its rise in England

is well known. By the ancient common law, felony was punished by the death of the criminal, and the forfeiture of all his goods and lands to the crown. Inasmuch as an action at law against a person, whose body could not be taken in execution and whose property and effects belong to the king, would be a fruitless and useless remedy, it was held to be merged in the public offense. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogatives. Therefore, a party injured by a felony could originally obtain no recompense out of the estate of the felon, nor even the restitution of his own property, except after the conviction of the offender. But these incidents of felony, if they ever existed in this country, were discontinued at a very early period in our colonial history. Forfeiture of lands or goods on the conviction of crime, was rarely, if ever, exacted here; and in many cases, deemed in England to be felonies and punishable with death, a much milder penalty was inflicted by our laws. Consequently the remedies to which a party injured was entitled in cases of felony were never introduced into our jurisprudence. But without regard to the original grounds of the doctrine, it has been urged in cases arising in this country that the rule now rests on sound public policy; that the interests of society require, in order to secure the effectual prosecution of offenders by persons injured, that they should not be permitted to redress their private wrongs, until public justice had been first satisfied by the conviction of the felon; that in this way a strong incentive is furnished to the individual to dis-

charge a public duty, by bringing his private interests in aid of its performance, which would be wholly lost if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. In answer to the arguments put in defense of an action to recover a large sum of money fraudulently abstracted from the ticket office of a railroad company, without first prosecuting the offender criminally for his act, the supreme court of Massachusetts, speaking through Mr. Justice Bigelow, said: "The whole system of the administration of criminal justice in England is thus made to depend very much on the vigilance and efforts of private individuals. There is no public officer, appointed by law in each county, as in this commonwealth, to act in behalf of the government in such cases, and take charge of the prosecution, trial, and conviction of offenders against the law. It is quite obvious that, to render such a system efficacious, it is essential to use means to secure the aid and co-operation of those injured by the commission of crime, which are not requisite with us. * * * On the other hand, in the absence of any reasons, founded on public policy, requiring the recognition of the rule, the expediency of its adoption may well be doubted. If a party is compelled to await the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon. Nor can it contribute to the purity of the administration of justice, or tend to promote private morality, to suffer a party to set up and maintain, in a court of law, a defense founded

solely on his own criminal act. The right of every citizen, under our constitution, to obtain justice promptly and without delay, requires that no one should be delayed in obtaining a remedy for a private injury, except in a case of the plainest public necessity. There being no such necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence. We are strengthened in this conclusion by the weight of American authority, and by the fact that in some of the states where the rule has been established by decisions of the courts, it has been abrogated by legislative enactment'' (21).

(21) Boston & W. Ry. Co. v. Dana, 1 Gray 83

CHAPTER III.

THE CRIMINAL INTENT.

Section 1. In General.

§ 27. The mens rea or guilty mind. From what was said in the preceding topic, the reader has observed that a crime consists of two elements, the intention and the act. This essential intention has frequently been expressed in the maxim "Actus non facit reum, nisi mens sit rea." The general idea embodied in this maxim is excellently expressed in the language of Mr. Justice Stephen in a case that came before all the judges of England for consideration; and the idea cannot be better expounded than by quoting from his language, which has been so often and generally quoted, that it may fairly be said to be a classic expression of it. His statement was made in discussing a prosecution for violation of an English statute declaring it a felony and punishable with penal servitude for any person having a former husband or wife living to marry another; but with a proviso that "nothing in this act shall extend to any person marrying a second time whose husband or wife shall have been continuously absent from such person for a space of seven years, last past, and shall not have been known by such person to be living within that time." The woman being prosecuted in the case under consideration had been deserted by her husband nearly seven years before her second mar-

riage, and upon diligent inquiry had been informed that he had sailed for America on a vessel which had gone down with all hands. The statement of the doctrine by Mr. Justice Stephens was in the following language:

"My view of the subject is based on a particular application of the doctrine, usually, though I think not happily, described by the phrase 'non est reus, nisi mens sit rea'. Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds: It naturally suggests that apart from all particular definitions of crimes, such a thing exists as a 'mens rea', or 'guilty mind', which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. 'Mens rea' means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with the woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention, for instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory, indeed, to describe a mere absence of mind as a 'mens rea', or 'guilty mind'. The expression again is likely to, and often does, mislead. To an unlegal mind it suggests that by the law of England, no act is a crime which is done from laudable motives; in other words, that immorality is

essential to crime. * * * It is a topic frequently insisted upon in reference to political offenses, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents. Like most Latin maxims the maxim of 'mens rea' appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise, than a practical rule. * * *

"The principal involved appears to me, when fully considered, to amount to no more than this: The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise, than they formerly were. The mental element of most crimes is marked by the words 'maliciously', 'fraudulently', 'negligently', or 'knowingly', but it is the general —I might, I think, say, the invariable—practice of the legislature, to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion, are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined. The meaning of the words 'malice', 'negligence,' and 'fraud' in relation to

particular crimes, has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the malicious mischief act, and a third in relation to libel, and so of fraud and negligence. With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality, as much as competent age and sanity. To take an extreme illustration, can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime, in a state of somnambulism, would be entitled to be acquitted? Why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. * * * A bona fide claim of right excuses larceny, and many of the offenses against the malicious mischief act. Apart, indeed, from the present case, I think it may be laid down as a general rule, that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offense. I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: A constable reasonably believing a man to have committed murder, is justified in killing him to prevent his escape; but, if he had not been a constable, he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law, on the part

of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter. I think, therefore, that the cases reserved fall under the general rule as to mistakes of fact, and that the convictions ought to be quashed.

"I will now proceed to deal with the arguments which are supposed to lead to the opposite result. * * * In the first place, I will observe upon the absolute character of the section. It appears to me to resemble most of the enactments contained in the consolidation acts of 1861, in passing over the general mental elements of crime which are presupposed in every case. Age, sanity, and more or less freedom from compulsion, are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words 'wilfully and maliciously' or by specifying some special intent as an element of particular crimes, knowledge of fact is implicity made part of the statutory definition of most modern definitions of crimes. But there are some cases in which this cannot be said. Such are section 55 on which Queen v. Prince, (1) was decided; Sec. 56, which punishes the stealing of 'any child under the age of fourteen years'; Sec. 49, as to pro-

(1) L. R. 2 C. C. 154.

curing the defilement of any woman or girl under the age of 21—in each of which the same question might arise as in Queen v. Prince. * * * It was the case of a man abducting a girl under 16 believing on good grounds that she was above that age. Lord Esher, then Brett, J., was against the conviction. His judgment establishes at much length, and it seems to me, unanswerably, the principle above explained, which he states as follows: 'That a mistake of fact on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offense at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England.' Lord Blackburn, with whom nine other judges agreed, and Lord Bramwell, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts, they thought, the legislature intended to be done at the peril of the person who did them, but not all. * * * Lord Bramwell's judgment proceeds upon this principle: 'The legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of 'mens rea'. * * *

"The application of this to the present case appears to me to be as follows: The general principle is clearly in favor of the prisoners, but how does the intention of the legislature appear to have been against them? It could not be the object of parliament to treat the mar-

riage of widows as an act to be, if possible, prevented, as presumably immoral. The conduct of the woman convicted was not in the smallest degree immoral; it was perfectly natural and legitimate. Assuming the facts to be as she supposed, the infliction of more than nominal punishment, on her, would have been a scandal. Why, then, should the legislature be held to have wished to subject her to punishment at all? * * * It is argued that the proviso that a remarriage after seven years' separation shall not be punishable, operates as tacit exclusion of all other exceptions to the penal part of the section. It appears to me that it only applies a rule of evidence which is useful in many cases, in the absence of explicit proof of death." The conviction was quashed (1a).

§ 28. **Motive distinguished.—Intent to do wrong.** The reader should be cautioned against a common error. It is often supposed that the criminal intent consists in, or includes, an intent to do wrong, or an intent to violate the law. It involves nothing of the kind. The fallacy of this supposition is well illustrated by a case and opinion in the Supreme Court of the United States. A Mormon was prosecuted for bigamy and set up his religious belief that it was right, and the constitutional provisions guaranteeing the freedom of religion, as a defense. This defense not being allowed, he appealed, and his conviction was affirmed in the following language by Chief Justice Waite:

"Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of

(1a) Queen v. Tolson, L. R. 23 Q. B. Div. 168.

religion. The first amendment to the constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is; whether the law under consideration comes within this prohibition. * * * Congress was deprived of legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. * * * In our opinion the statute immediately under consideration is within the legislative power of congress. It is constitutional and valid as prescribing the rule of action for all those residing in the territory, and in places over which the United States have exclusive control.

"This being so, the only question which remains, is whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would introduce a new element into criminal law. Laws are made for the government of actions, and while they can not interfere with mere religious beliefs and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship. Would it be seriously contended that the civil government under which he lived could not interfere to prevent such a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil gov-

ernment to prevent her from carrying her belief into practice? So here, as the law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew that he had been once married and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore he married a second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done and the crime was therefore knowingly committed. Ignorance of fact may sometimes be taken as evidence of want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion. It was still belief, and belief only'' (2).

Section 2. Kinds of Intent.

§ 29. General statement. From what has been said we may conclude that while criminal intent is a state of mind

(2) Reynolds v. United States, 98 U. S. 145.

of the criminal at the time the crime is committed and essential to criminality in the particular case, that intent must be carefully distinguished from the motive which induces him to do the act, or the belief in its righteousness or wicked character; and that this intent varies so much in the different crimes that no more precise and definite statement can be made as to what particular intent must exist in general. Nevertheless a review of all the crimes on the calendar will show that criminal intent in every case consists of one or the other of the following states of mind:

1. A direct intent to do the act which the law has declared to be a crime. 2. An intent to do some other criminal act from the doing of which the crime charged resulted as a natural consequence, though perhaps not foreseen. 3. A criminal neglect of duty, by reckless misfeasance, or negligent omission, from which neglect the criminal act resulted as a natural consequence. 4. The case is one of that large class in which the legislature has felt that the difficulty of proving an actual intention and the danger to the public from allowing guilty persons to escape whose guilty intention could not be proved was so great that the act has been declared criminal by statute regardless of any intention to commit it—in other words, the citizen in cases of this kind acts at his peril.

In addition to the various intents above expressed, which are commonly designated as general criminal intent, there are certain crimes in which an essential element of the crime is the object designed to be accomplished by doing the act; in other words, the crime con-

sists, not of the act intentionally done, as is the case in most crimes, but consists of these three elements: 1. The act. 2. The intent to do it. 3. The purpose to be accomplished by doing it. For example, the crime of assault with intent to kill consists of three elements—The act of assaulting, the intent to assault, and the design to kill by doing so. In like manner burglary consists of three elements: The act of breaking in, intentionally done, for the purpose of committing a felony in the building when it has been entered. Now let us look at each of these various kinds of intent separately.

§ 30. **Direct general intent.** This is the common case of criminal intent, namely, the intention to do the act done. That this intention accompanying an act criminal in its nature suffices to constitute a crime, is so plain that further discussion of it is unnecessary.

§ 31. **Intent to do some other crime.** It is so just and necessary for the public protection that one designing to commit a particular crime and in the attempt accidentally committing some other crime which he did not intend, should be punished, that it has long been an established doctrine of the law that everyone is liable criminally, not only for what he actually intended but for all its natural and direct consequences, whether foreseen or not. This intent is called constructive intent. The intent to do the one crime is constructively accepted as an equivalent for the wrong unintentionally resulting. This point is well illustrated by an old case.

Roper's daughter Agnes married Gore; Gore became sick; Roper went to Dr. Gray for advice, who gave him a

prescription to apothecary Martin, who prepared it as ordered with one change, for want of that ingredient; Agnes secretly added ratsbane to it to kill her husband, and gave him part of it, on which he became very sick; Roper took some, and also became sick immediately; next day C took some and likewise became sick; but they all recovered. Observing these results Roper took it to Dr. Gray complaining; who sent for Martin to explain; who said it was as ordered with one change, which Doctor Gray approved; then Martin said: "To the end you may know that I have not put anything in it which I myself will not eat, I will before you eat part of it:" and thereupon he took the box, stirred it with his knife, took some of it, and next day died. The question was on all this matter whether Agnes had committed murder. The case was delivered to all the judges of England for their opinion. The doubt was because Martin himself, of his own motion, not only ate of it, but stirred it and so incorporated the poison that it was more forcible than as Agnes made it; for those who ate before lived, but Martin's mixture was fatal. It was resolved by all the judges that Agnes was guilty of the murder of Martin; for the law conjoins the murderous intent of Agnes in putting the poison into the electuary to kill her husband with the event which thence ensued—the death of Martin. For the putting of the poison into the electuary was the occasion and cause, and the poisoning and death of Martin the result, and without the poison put in by Agnes, the death would not have been caused by Martin stirring it (3).

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(3) Gore's Case, 9 Coke's Rep. 81a.

§ 32. **Malum prohibitum or tort intended.** If the act which the defendant intended to do is not in itself wicked nor harmful, but is criminal merely because the law has forbidden it to be done; for example, to drive on the street faster than a certain pace, or to store gunpowder at a certain place in the city, the intention to violate this statutory provision is not such a criminal intent as will by construction supply the lack of intent to do some act which accidentally results from it, so as to make this other act a crime. For example if a man were driving on the streets at a pace faster than the law permits, and by reason of driving at this pace, should run over and kill some person, he would not be liable for manslaughter unless the act he did was so reckless that a person of ordinary caution could see that it was dangerous. The mere fact that the act is prohibited is not enough to make the doing of that act supply the lack of intention to do the other act which accidentally results from it.

The statute of 9 and 10 William III, c. 7, prohibited the manufacture of fireworks and storage of explosives in certain parts of the city. The defendant kept gunpowder in his building in violation of this statute, and by the negligence of his servants the explosives were ignited, the house burned, and a man in the house thereby killed. It was held that the mere keeping of the fireworks in violation of the statute was not sufficient to make the defendant liable for manslaughter, the prohibited act not being such that a reasonable man could see that the result that occurred might naturally flow from it (4).

(4) Queen v. Bennett, 8 Cox Cr. Case 74.

The defendant having in mind merely the initiation of a refreshment-stall keeper at a summer resort, took a large box from the stall and threw it into the sea. It fell on a bather in the sea and killed him; and the court instructed the jury that the intention to injure the refreshment-stall keeper was not sufficient to make the defendant liable for manslaughter, but that if the act he did was so manifestly dangerous to life, that one of ordinary prudence might see that death might result, the defendant would be liable; and on this ground he was convicted (5).

§ 33. **Mere recklessness and negligent omission of duty.** The case just cited furnishes a very apt illustration of the rule of liability for mere recklessness resulting in injury; what has been said above in §14 and §15 makes sufficiently clear the rule of liability for negligent omissions of duty; and therefore nothing further need be said on these points.

§ 34. **Intention must exist at the time.** As has already been intimated, no crime is committed unless the act which the law declares criminal and the intention to do it exist at the same time. If the intention exists at one time and later unintentionally the act is done, or if the act is done without criminal intent and later the criminal purpose is conceived, no crime is made out; the two must co-exist. For example, if a person finds lost property, knowing who the owner is, and picks it up with the design of taking it to the owner, no intention to appropriate it to his own use, formed after he has reduced it to his possession, would make the taking larceny. What one

(5) Queen v. Franklin, 15 Cox Cr. Cases 163.

commands another to do he is himself responsible for; but if my agent commits a crime without my knowledge or consent and I ratify his act by accepting the proceeds of his transaction, I do not thereby become criminally liable for the doing of the act, because my intention did not exist when the act was done. And yet very frequently the intention existing at the time may justly be inferred from acts done afterwards.

§ 35. **Proof of intention.** The intention being a state of mind is not open to observation like substantial things on the surface, but can be known only by the conduct of the person. What a man thinks and intends is known from what he does. Acts performed a long time before, or a long while after may throw light upon the intention existing at the time of the crime. The best proof of intention at the time is the action at the time. What a person in possession of his faculties does, he is presumed to intend to do; and ordinarily we have no satisfactory means of determining one's intent except by his conduct.

On an indictment for burglary it was objected in behalf of the prisoner that there was no proof of intention to commit burglary because the defendant did not take enough property from the building to make the larceny a felony; that he could not be presumed to have intended to take more than was in the building, and there was not enough in the building. But the court said that the fact that he took anything indicated that he would have taken whatever he could have found, and the crime consisted not in taking the property, but in breaking and entering the building for the purpose of taking it; and his purpose

in entering was manifested by what he did after he entered (6).

On the other hand, when a man went to a hotel and registered, and in the night left his room and stole cigars and money from the bar-room, the court held that from the subsequent act of stealing no presumption was warranted that he went to the house for the purpose of stealing, so as to make his fraudulent entry and registering amount to a constructive breaking into the building at night, so as to make the crime burglary. The court said: "If after having made an entry into the house by authority of law, he committed a trespass, he may be held civilly responsible as a trespasser ab initio. This principle has always been recognized since the decision of the Six Carpenters' Case (7). The prisoner, therefore, had a right to enter the inn and the bar-room; and the question arises whether the larceny committed in the bar-room can relate back, and give a character to the entry into the house, so as to make it criminal and the prisoner punishable for it, upon reasoning similar to that, which, in a civil action, would render him liable as a trespasser ab initio. Except the inference that may lawfully be made from the act of larceny there is no evidence that he entered with any illegal purpose, or a felonious intent. Where the law invests a person with authority to do an act the consequences of an abuse of that authority by the party should be severe enough to deter all persons from such an abuse. But has this 'policy of law' been extended to criminal

(6) Harvick v. State, 49 Ark. 514.

(7) 8 Coke 146.

cases? We are not aware that it has. It is true that, in order to ascertain the intent of the accused, the law also regards the nature of the act committed, but this is generally such an act as could not have been committed with any other than a criminal purpose. Thus, the act of secretly taking the property of another, necessarily raises the presumption that the party intended to steal. * * * But where one lawfully enters a house, it by no means follows that because he steals while there, he entered with that purpose" (8).

§ 36. **Acts criminal by statute when done unintentionally.** It is believed that no act unintentionally done and not resulting from negligence is criminal in the absence of the statute. But there is a large class of cases in which the difficulty of proving intention, the danger of miscarriage of justice from inability to prove it, and the danger to the public from violation of the statute, are so great that the legislature has deemed it politic to make all persons acting in such matters move at their peril. Whether this is the case under any particular statute depends upon the intention of the legislature, which may be clearly and explicitly expressed or only to be gathered from the general terms of the statute.

One indicted under a statute making it a misdemeanor to sell watered milk contended that the prosecution must prove that he knew the milk was watered. But the court held that knowledge of this fact was no essential ingredient of the crime, because the language of the statute did not require such proof. "The statute of 1863, c. 140, re-

(8) State v. Moore, 12 N. H. 42.

quired such proof, and one of the reasons which induced the legislature to repeal it and substitute an existing statute for it undoubtedly was that they regarded it as impracticable in most cases to prove the knowledge, and that they also regarded it as reasonable under all the circumstances that the seller of milk take upon himself the risk in knowing that the article he offers for sale is not adulterated. It is one of the greatest importance that the community shall be protected against the frauds now practiced so extensively and skilfully in the adulteration of articles of diet by those who deal in them; and, if the legislature deem it important that those who sell them shall be held absolutely liable, notwithstanding their ignorance of their adulteration, we can see nothing unreasonable in throwing this risk upon them. It is the same risk which every man takes who sells intoxicating drinks, the law making him liable to the penalty, although it is not proved that he knew that the liquors were intoxicating'' (9).

§ 37. **Specific intent.** Where the crime consists of the three elements, the act done, the intention to do it, and the criminal purpose to be accomplished thereby, no conviction can be had by proof of the act intentionally done without proof of the particular criminal purpose to be accomplished thereby, which constitutes the specific intent essential to that particular crime. For example, when a night watchman attempted to arrest a burglar discovered in the shop at night, the latter struck the watchman twice with a crow-bar, and then ran away, telling

(9) Commonwealth v. Farren, 9 Allen 489.

him to sit still or it would be worse for him. On indictment for assault with intent to murder, maim, and disable, the jury found that the defendant intended only to disable temporarily until he could escape; and on this finding all the judges, except two, held the conviction was wrong (10).

§ 38. **Constructive specific intent.** Where the specific intent is an essential element of the crime it must for the most part be made out by proof that the essential intention really and directly existed; and it is not enough to show that the accused had some other criminal intent from attempting which the crime charged resulted as a natural consequence. But to a certain extent this specific intent may be supplied by a construction similar to that which will suffice to make out the constructive general intent. For example, on a charge of assault with intent to kill one Thompson, it appeared that the defendant was a friend of Thompson, and would not intentionally injure him; but that, a brother of the defendant having been injured, the defendant designed to be revenged for this injury, and mistaking Thompson for the person who had committed the injury, stabbed him in the back with intention to kill. The court held that the intention to kill the person at whom he struck was the only intention essential; and that he mistook Thompson for the other man was immaterial (11). In another case the court held that assault with intent to do bodily harm to the person injured was made out by proof that the blow was struck

(10) Rex v. Boyce, 1 Moody 29.

(11) McGehee v. The State, 62 Miss. 772.

with intent to injure another and glanced off and injured the person named in the indictment (12).

But where the indictment was for malicious destruction of property it was held that the malice indicated by the intention to injure a person was not sufficient to sustain the charge, the missile having struck and injured the property (13).

From these cases it would seem that the only instances in which the specific intent can be supplied constructively is when the thing intended is of the same nature as the thing done.

Section 3. Impediments to Criminal Intent.

§ 39. Corporations liable for crime. It was held in the early history of the law that, as a corporation was soulless, it could do no wrongful or immoral act, and could not, therefore, be liable in tort. This doctrine has long since become obsolete; but nevertheless it has been claimed that a corporation could not do a positive crime, because such acts would be beyond the powers conferred upon it by its charter. Such a rule would lead to its absolute immunity for all wrong, which the experience of today shows would produce great injustice both to individuals and the public. If it be said that the individuals who might do the act, would be liable, it may be said that this is true as to every servant or agent who does a wrong; but because this is so, the principal is not exempt. The object should be to reach and punish the real power in

(12) Queen v. Latimer, 16 Cox Cr. Cases 70.

(13) Queen v. Pemberton, 12 Cox Crim. Cases 607.

the matter, and thus prevent the repetition of the offense. It is true there are crimes which, from their very nature, as perjury, for example, corporations cannot commit. But wherever the offense consists in either a misfeasance or nonfeasance of duty to the public, and a corporation can be reached for punishment, as by fine and seizure of its property, precedent authorizes, and public policy requires, that it should be liable to indictment. Any other rule would in many cases preclude adequate remedy, and leave irresponsible servants to answer for the offense, rather than those who are really most at fault. If it be said that such a rule may subject the property of innocent stockholders to forfeiture for the acts of the directors to which they are not actually parties, and of which they have no knowledge, the answer is that they select the directors, and it is their business to have those who will see that the corporate business is conducted so as not to injure others. For these reasons corporations are now generally held liable for their criminal acts (14).

§ 40. **Liability of married women.** It is an old rule of the common law that inferior crimes committed by a married woman, in the presence of her husband, are presumed to have been committed by his command and compulsion, without the acquiescence of the woman; and for this reason the law still is that a married woman is not liable for minor crimes committed in the presence of her husband unless it appears that it was her own wilful act. But this rule does not extend to homicide; and therefore a married woman was held liable for murder in holding a man while

(14) Commonwealth v. Polaski C. A. M. Ass'n, 92 Ky. 197.

her husband killed him, although it was proved that he commanded her to do so, and swore at her because she did not obey to his satisfaction (15).

§ 41. **Crime at command of superior.** The fact that one in the employ of another is commanded by his employer to commit a known crime is no excuse to the inferior, and merely makes the superior liable. This rule holds good in all cases of persons under authority unless it be in the cases of soldiers and sailors in actual service, who at the command of a superior do an act of doubtful legality. The reason for this exception, if it be allowed at all, is that the necessity for immediate and implicit obedience is vital to the success of all military and naval maneuvers; and if a sailor or soldier were to stop to decide upon the validity of commands given to him, the power of the army and navy would be paralyzed (16).

§ 42. **Duress as a defense to a criminal charge.** That the defendant was in immediate fear and peril of life or limb, and did the act in self-preservation, has been allowed as a defense to minor crimes, such as malicious destruction of property. But this defense is never made out unless the proof shows that the duress and peril existed at the very time the act was committed, and that there was no opportunity for the defendant to escape. This defense never was allowed as to offenses touching life or any of the other heinous crimes. In such cases the law considers that the danger from allowing such defenses is so great that the person assaulted should be re-

(15) Bibb v. State, 94 Ala. 31.

(16) United States v. Clark, 31 Fed. Rep. 710.

quired at his peril to defend himself rather than inflict the injury upon another (17).

§ 43. **Self-preservation from peril.** Where the peril to the defendant has arisen from natural causes and not from the crime of another, the courts have sometimes been perplexed to decide whether the natural instinct of self-preservation should be allowed as an excuse for taking the life of another. This point can be well illustrated by an actual case. Two men were indicted and convicted of murdering a boy on the high seas. The jury found by special verdict that the prisoners and deceased were escaped from a shipwreck, and adrift on the sea on a raft, with nothing to eat; and that, when near to starvation, they killed the boy and ate his flesh. The main defense was necessity. In denying the validity of this defense, Lord Chief Justice Coleridge said:

"From these facts, stated with the precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation, and to suffering which might break down the bodily powers of the strongest man, and try the conscience of the best. * * * It is clear, that the prisoners put to death a weak and unoffending boy, upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with a certainty of depriving him of any possible chance of survival. The verdict finds in terms that 'if the men had not fed on the body of the boy, they would probably not have survived,' and that 'the boy, being in a much weaker condition was likely to have died before them.' They

(17) Arp v. State, 97 Ala. 5.

might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all. In either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, them who killed him. Under these circumstances the jury say they are ignorant whether those who killed him were guilty of murder, and have referred it to this court. * * *

"There remains to be considered the real question of the case, whether killing under the circumstances as set forth in the verdict, be or be not murder. The contention that it could be anything else was to the minds of us all, both new and strange; and we stopped the attorney general in his negative argument that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before it, and we are now to consider and determine what it amounts to. First, it is said that it follows from various definitions of murder in the books of authority—which definitions imply, if they do not state, the doctrine—that, in order to save your own life, you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever, towards you or anyone else. But, if these definitions be looked at, they will not be found to sustain the contention. * * *

The real authority of former times is Lord Bacon, who, in his commentary on the maxim 'Necessitas inducti privilegium quoad jura privata' lays down the law as follows: 'Necessity carrieth a privilege in itself. Necessity is of three sorts: Necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First, of conservation of life. If a man steals viands to satisfy his present hunger, this is no felony or larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side, to keep himself above water, and another to save his life, thrust him from it, whereby he is drowned, it is neither se defendendo nor by misadventure, but justifiable.' * * * If Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbor, it certainly is not law at the present day. * * * Now, it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse, admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity. But the temptation to the act which existed here was not what the law has ever called 'necessity.' Nor is this to be regretted. Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality, would be of fatal consequence, and such divorce would follow if the temptation to murder in this

case were to be held by law an absolute defense of it. It is not so. To preserve one's life is, generally speaking, a duty, but it may be the plainest and highest duty to sacrifice it. * * * It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. * * * There is no path safe for judges to tread, but to ascertain the law to the best of their ability, and to declare it according to their judgment; and if, in any case, the law appears to be too severe on individuals, to leave it to the sovereign to exercise that prerogative of mercy which the constitution has intrusted to the hands fittest to dispense it. It must not be supposed that, in refusing to admit temptation to be excuse for crime, it is forgotten how terrible the temptation was, how awful the suffering, how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we ourselves would not satisfy'' (18).

§ 44. **Inability to perform legal duty.** The law does not require the impossible. If a man, seeing his legal

(18) Queen v. Dudley, 15 Cox Crim. Cases 625.

duty, has, to the best of his physical ability, endeavored to perform it, the law will not visit punishment upon his failure from inability. Thus, in a prosecution for standing with horse and wagon in one place on a public street more than 20 minutes, in violation of a city ordinance, it was held a defense that the defendant was hemmed in by other vehicles and was unable to move on as the law required (19).

§ 45. **Mistake as to the facts, as a defense.** As a general proposition men are held liable criminally for their conduct according to the facts known to them at the time they did the act of which they are charged, or which by reasonable diligence they might have known; and if, without negligence on their part, they are mistaken as to the facts, and do an act which would be a crime if done with knowledge of the facts, they are held only according to the facts they knew. For instance, one Levet being indicted for the death of his servant, it appeared on the trial that while he was in bed at night, about 12 o'clock, a servant hearing a noise at the door, gave alarm to him that burglars were breaking into the house; whereon he, rising suddenly and taking his sword, ran down, and, hearing someone in the buttery, and supposing the burglar to be there, thrust his sword in and hit and mortally wounded his servant, who was there hiding; this was resolved to be neither murder nor manslaughter but misadventure (20). Of course this rule does not apply to the cases of those statutory crimes in which the legislature

(19) Commonwealth v. Brooks, 99 Mass. 434.

(20) Levet's Case, Cro. Car. 538.

has deemed it best to require all persons to act at their peril.

§ 46. **Mistake as to the law, as a defense.** As a general proposition, mistake or ignorance as to the law, is no defense to a criminal charge; and this is a rule of necessity, for if a man were allowed to allege his ignorance of the law to excuse his criminal act, it would be impossible to convict any one of crime; for few, if any, know the law perfectly, and most men are grossly ignorant of it; and if ignorance were a defense a temptation would be held out to the worst portion of the community to ignore the law and regard only their own desires. When Susan B. Anthony alleged in defense of a prosecution for voting contrary to law that she believed she had a right to vote, and at all events desired to have the question settled by the courts, and had deposited her ballot for that purpose; the fact that she had deliberated on the question and taken good legal counsel before voting was held to be no excuse or justification (21). So strict is this rule that a sailor who was at sea when the law was passed and committed a crime on board the vessel before there was any possible opportunity for him to have learned of the statute, was held liable to punishment for violating it (22).

But, where the crime consists of three elements—act, intention to do it, and criminal purpose to be accomplished thereby—and knowledge of the law constitutes an essential part of that specific intent, ignorance of the

(21) United States v. Anthony, 11 Blatchf. 200.

(22) Rex v. Bailey, Russell & R. 1.

law is a defense. For example, when a man indicted for robbery in taking a pheasant from the game warden, alleged that he supposed the game to belong to himself, the court held, that his belief that he had a right to take the property prevented the taking from being robbery (23).

§ 47. **Infancy as a defense.** From the earliest records of the common law it has been an established rule that an infant is not liable criminally for his acts until he has attained sufficient discretion to know right from wrong. As to all infants under seven years the rule has always been that the law conclusively presumes insufficient discretion to make the infant liable criminally for any act of any kind; but as to infants above that age and under the age of 14 the rule has been that the infant is liable criminally if it appears that he had sufficient discretion to know right from wrong; and in the older cases the courts were more willing to find a mischievous discretion than they are at the present time. Above the age of 14 there is a presumption that the infant has sufficient discretion to know the nature of his act and make him liable criminally.

§ 48. **Idiocy and dementia as defenses.** Persons above 14 years of age are presumed to know right from wrong; but if it appears that they have not the discretion of an average child of 14 they are not accountable criminally for their acts. Of course the immature intellect of a healthy child does not bear exact comparison with the stunted intellect of the simple adult or the imbecile.

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(23) Rex v. Hall, 3 C. & P. 409.

§ 49. **Intoxication as a defense.** Intoxication may blind the reason and exasperate the passions; and yet, as a man voluntarily brings it upon himself, he cannot use it as an excuse, justification, or extenuation of his crime. It has even been said that he should be more severely punished because of exposing himself to a condition in which he may injure himself or others. Yet where the question is sufficiency of provocation the fact that the defendant was intoxicated may be proved for the purpose of showing that he was more excitable and more liable to anger. Again where the question is whether the act was done with a specific purpose or deliberately and premeditatedly, the fact that the accused was intoxicated may be proved to show that he had no ability at the time to comprehend or deliberate.

§ 50. **Insanity as a defense: The early decisions.** The nature of diseases of the mind was very imperfectly understood when insanity was first set up as a defense in criminal cases; and the advance which science has made in the past two hundred years in this direction has exploded many theories concerning this subject. Time was in the history of our law when the veriest lunatic was not permitted to plead his providential affliction as a defense to his contracts. It was said in justification of so absurd a rule that no one could be permitted to stultify himself by pleading his own disability. So great a jurist as Lord Coke, in his attempted classification of madmen, laid down the rule of criminal responsibility to be that one should wholly have lost his memory and understanding; as to which Mr. Erskine, when defending Hadfield for

shooting the King, in 1800, A. D., justly observed: "No such madman ever existed in the world." After this great and historical case, the existence of delusion promised for awhile to become the sole test of insanity, and, acting under the duress of such delusion, was recognized in effect as the legal rule of responsibility. Lord Kenyon, after ordering a verdict of acquittal in that case, declared with emphasis that there was "no doubt on earth" that the law had been correctly stated in the argument of counsel. But as it was soon discovered that insanity often exists without delusions, as well as delusions without insanity, this rule was also abandoned. Lord Hale had before declared that the rule of responsibility was measured by the mental capacity possessed by a child of fourteen years; and other judges had ventured to decide, that to be irresponsible for crime a man must be totally deprived of his understanding and memory, so as not to know what he was doing, any more than an infant, a brute, or a wild beast. All these rules have necessarily been discarded in modern times, in the light of the new knowledge acquired by a more thorough study of the disease. Later the test was held to consist of a knowledge that the crime committed was "against the laws of God and nature", thus meaning an ability to distinguish between right and wrong in the abstract.

§ 51. **Insanity: The right and wrong test.** For over half a century, in England and in most of the American states, the test of responsiblity of insane criminals has been their ability to distinguish between right and wrong as applied to the particular case. This is the rule as laid

down in the celebrated McNaughten's Case in the English House of Lords in 1843 (24). This rule is thus stated by Chief Justice Shaw in a Massachusetts case: "A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing—a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power and memory to recollect the relation in which he stands to others, and in which others stand to him; and that the act he is doing is contrary to the plain dictates of justice and right, injurious to others and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know, that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt from responsibility from criminal acts" (25).

§ 52. **Insanity: Irresistible impulse.** The opportunities for observation of insane persons by medical experts in our modern insane asylums have shown that there are forms of insanity in which the afflicted person does not labor under any delusion, realizes the criminal nature of his act, and yet is driven by irresistible impulse of his

(24) 10 Clark & Fin. 200.

(25) Commonwealth v. Rogers, 7 Metc. 500.

affliction to do what he would gladly avoid doing; and it has been claimed justly and logically enough that if a person is in such a condition and does a criminal act by force of this irresistible impulse he should not be punished criminally for it. But the defense of insanity is so liable to abuse and so frequently resorted to as a defense of last resort, that the courts have been loathe to allow it in such cases. In one case the judge said: "It has been urged for the prisoner that you should acquit him, on the ground that, it being impossible to assign any motive for the perpetration of the offense, he must have been acting under what is called a powerful and irresistible influence of homicidal tendency. But I must remark, as to that, that the circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief; but if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must therefore return to the

simple question you have to determine—did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong?'' (26). Notwithstanding these reasons a number of American courts have adopted the rule that a person is not responsible criminally for an act produced by an irresistible impulse of his insane condition (27).

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(26) Queen v. Haynes, 1 Foster & Fin. 666.

(27) State v. Parsons, 81 Ala. 577.

CHAPTER IV.

THE CRIMINAL ACT.

Section 1. Incipient Acts.

§ 53. **Evolution of the act.** A man who designs the commission of a crime, first conceives that it might be done, then determines upon it, perhaps communicates these ideas to others, asks their assistance, and agrees with them upon it; and at all events, if he proceeds further with it, he must then make the attempt before the act is completed. If we look back over the act as thus developed we see that it includes five parts: 1. The idea. 2. The decision. 3. The suggestion or solicitation to crime. 4. The conspiracy of the parties. 5. The attempt to accomplish the criminal purpose. If the idea is repelled, or, even after determining upon it, if the sinner repents without doing more, the law takes no notice of it, though he may have confessed openly that he had determined upon the criminal act; for it is a principle of law that mere intention alone will not constitute crime. But each of the other stages of development of the act constitute a separate crime and deserve separate mention, as follows:

§ 54. **Solicitation to crime.** If the law should permit persons to go about soliciting others to commit crime, men who would not think of such a thing themselves

would be induced to violate the law, and punishment of the several offenders would still leave the aggravating cause untouched. Many times the person doing the act would be the mere tool of the real criminals who contrived the crime and induced him to commit it. Therefore it has long been an established principle of law, that solicitation to crime is in itself criminal, whether the suggestion is acted upon or not. A plain instance of a crime of this kind is the offering or asking for a bribe.

§ 55. **Conspiracy.** It has long been established that it is criminal and punishable to conspire to commit a crime or in many cases to do an illegal act not criminal; and it is immaterial whether the criminal act designed was the means of accomplishing a lawful object or was itself the object of the conspirators. Therefore it has often been said that a conspiracy is an agreement to do an unlawful act by lawful means or a lawful act by unlawful means. While it is clear that any agreement to do a criminal act, either as means or end is criminal, the decisions are in considerable conflict as to agreements to do wrongful acts not criminal. It is clear that mere agreements to commit a tort are not always criminal; to agree upon certain torts would be a criminal conspiracy; to agree upon others would not be; but exactly which would and which would not, it would be difficult, if not impossible, to say. On the other hand, it is believed that no agreement can be a criminal conspiracy unless the thing agreed to be done is at least unlawful—a legal wrong.

§ 56. **Conspiracy: The strike and boycott.** This question has received considerable discussion as applied to

cases of strikes and boycotts. It has been urged that every man has a right to say under what conditions he will work, whether he will continue or quit, whether he will work for or with another man or not; and what each may lawfully do for himself several may lawfully agree to do or not to do. If it is not unlawful to do it, it is not unlawful to agree to do it, to promise to do it, or to threaten to do it. If each may do it, all may do it, and unite in doing it. The same rule applies to the boycott, each man may trade where he pleases, may tell others where he is trading, and may agree with them where he will trade or will not trade. On the other side, it has been argued that while an employer is not greatly inconvenienced by one man leaving him nor a merchant severely injured by the loss of one customer; yet for all the employees to leave in a body, or a large part of the public to agree to boycott him is a serious disaster to the employer or merchant; and because it is a great disaster to the employer to be deserted by all his men, or the merchant to be abandoned by a large part of his patrons in a body, therefore agreeing to do these things should be punished as a criminal conspiracy. The force of these objections and arguments is much greater when applied to the sympathetic strike and secondary boycott. It may be that the employer or merchant would not be seriously embarrassed by the desertion of the particular employees or patrons who unite in the strike or boycott, and yet would be very seriously injured by losing the help and patronage of others who would desert him through fear of the threats of his former employees or patrons to labor

for or deal with no one who deals with him. This is still a live and vexed question. There are several cases in which it has been held that the secondary boycott is a criminal conspiracy, and others in which it has been held that such agreements are at least not criminal, though they may be a civil violation of the legal right of the employer to buy labor or of the merchant to trade (1).

§ 57. **Attempt.** Unsuccessful attempts to commit crimes are themselves punished criminally, because punishing the attempt prevents its being made and often protects the public from further attempts which might prove successful. In order to constitute an attempt there must be a design to commit a crime and something done towards its commission but falling short of completion. It has often been said that there can be no attempt unless the commission of the crime would be possible. This notion followed to an extreme logical conclusion would prevent any act being an attempt; for if the act is attempted and its perpetration is possible in the manner attempted, the crime will be committed. It has even been held that a man could not be convicted of an attempt to murder by proof that he pointed a gun and tried to discharge it when it was not loaded. On the other hand, when this inability was set up as defense to a charge against a boy of nearly fourteen years of attempt to rape, the defense was not allowed, and the court said that women might be in great danger from precocious boys and emasculated men if such assaults could be committed with im-

(1) Commonwealth v. Hunt, 4 Metc. 111; State v. Donaldson, 32 N. J. L. 151; State v. VanPelt, 136 N. C. 633.

punity (2). The same defense has been set up in prosecutions for attempted larceny from a person when he had nothing to be stolen; but the courts have generally held that the danger from allowing pickpockets to escape punishment unless they found something in the pockets is too great to permit such defenses, and the accused are quite as deserving of punishment whether they succeed or fail (3). On indictment for assault with intent to murder it was held that the defendant was guilty although he shot at a place that had just been left by his intended victim, and it would be impossible to shoot a man where he was not (4).

Section 2. Ultimate Acts.

§ 58. **Ultimate acts classified.** Having in the preceding sections traced the various preliminary acts leading up to a crime, but falling short of its actual perpetration, we come now to consider the completed acts; and these are of three kinds: 1. Criminal. 2. Justifiable. 3. Excusable. The criminal acts may be either the doing of a positive wrong or a neglect of duty in misfeasance or nonfeasance, and the force employed in doing the wrong may be direct or indirect, physical or mental.

§ 59. **Crimes by indirect force.** From the cases mentioned in § 14 and § 15, above, the reader will see that the wrong may consist in a negative as well as a positive act. The force exercised to commit the crime may also be direct or indirect. An example of manslaughter by in-

(2) Commonwealth v. Green, 2 Pick. 380.
(3) People v. Moran, 123 N. Y. 254.
(4) People v. Lee Kong, 95 Cal. 666.

direct force is furnished by the case of the prosecution of the sheriff who confined the deceased against his will in a jail known by the sheriff to be infested with small-pox, from which exposure the deceased was stricken and died. Another instance is furnished by the case in which the defendants procured the execution of the deceased by conspiring to lead him into an apparent robbery and obtain his conviction therefor, to get the reward offered for convicting highway robbers (5). An instance of crime by force exercised upon the mind of the person injured is afforded by the case of the man who pulled the hair of the nurse so that her screaming scared the child she held into fits from which it died (6). In another case a conviction of assault with intent to do great bodily harm was sustained by proof that the defendant scared his wife so that she fell out of a window and was injured (7).

§ 60. **Obedience to official orders as justification.** Obedience to the orders of a superior officer having authority to give orders in such cases, is undoubtedly a sufficient answer to a criminal charge, regardless of the propriety of the order given. The sheriff who burned Latimore and Ridley at the orders of Queen Mary was held not liable to punishment under the reign of Queen Elizabeth for this reason. But if the order is one which the superior officer has no authority to give in any case, it will be no excuse or justification to the inferior when prosecuted for the act. An act of piracy committed by the first lieutenant on a privateer schooner at the command of the captain,

(5) Rex v. MacDaniel, 1 Leach C. C. (3d ed.) No. 21.

(6) Rex v. Towers, 12 Cox Cr. Cases 530.

(7) Queen v. Halliday, 61 L. T. R. 701.

was held to be no defense, because the command was clearly illegal (8).

§ 61. **Exercise of official authority as an excuse.** Within proper limits a chastisement inflicted by a parent or teacher upon a child or pupil is justified by the relation of the parent or teacher, and the same may be said of policemen and sheriffs in exercising authority over the jail or preserving the peace. But a sheriff who cruelly treats a prisoner or a teacher who inflicts punishment with unlawful instruments upon his pupils is liable criminally for his act. A teacher who switches a pupil for a supposed violation of the rules of the school is not liable criminally because it turns out that the child had not been guilty of any violation of the rule, for a teacher is not bound to be infallible any more than anyone else. It is enough that he has reasonable cause and acts with discretion. But a teacher who assaulted a pupil with a club, struck him in the face with his fists, swore at him, and said he could lick any man in the district, was held for criminal assault and battery (9).

§ 62. **Arresting felons and preventing felony.** From the earliest days of the common law it has been a rule that any person who sees a felony committed, or an officer who is credibly informed that a felony has been committed, may go to the extent of taking the life of the felon to prevent his escape. But it would seem that at the present time a citizen cannot justify a homicide to prevent the perpetration of the felony or the escape of

(8) United States v. Jones, 26 Fed. Cases 653.

(9) Boyd v. The State, 88 Ala. 169.

the felon unless the felony was one accompanied by force and peril to life. For this reason it was held that shooting a horse thief to prevent escape was not justifiable (10).

§ 63. **Self-defense.** The instinct of self-preservation is recognized by the law as a valid excuse for an innocent person's killing a guilty one, if it appeared to the defendant at the time of his act that there was no other reasonably safe means of escape. When one, who is without fault himself, is attacked by another in such a manner, or under such circumstances, as to furnish reasonable ground for apprehending a design to take his life, or do him great bodily harm, and there is reasonable grounds for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger. The killing will be justifiable although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be the subject of judicial review. But he will not act at the peril of making that guilt if appearances prove false which would be innocence if they proved true. While going about his own affairs A sees B walking rapidly towards him with a pistol in his outstretched hand using violent menaces against his life as he advances. As soon as he approaches near enough A strikes him to the ground

(10) Storey v. State, 71 Ala. 329.

and B dies. It turns out that the pistol was loaded with powder only and B's design was only to terrify A. Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol? Those who would hold such a doctrine must require that a man so attacked shall examine the pistol to learn how it is loaded before he strikes his assailant. Such a doctrine would entirely destroy the right of self-defense. But where a man brings the danger upon himself by beginning the quarrel, he cannot avail himself of this defense if he is afterwards crowded by his opponent and compelled to kill to save his own life, unless he succeeded in withdrawing from the contest sufficiently to inform his opponent that the fight is over. It is also an old rule that one attacked has no right to take the life of another if opportunity for retreat was open; for he must not set his pride above the value of human life. He must withdraw if he can; but if to withdraw would merely increase his danger, as would be the case if he were assaulted at close range with a deadly weapon, he is not bound to retreat. Another exception to the rule that the innocent man must retreat to the wall exists by reason of the fact that no man is bound to flee from his own house. His house is his castle, and if assaulted there he may safely stand his ground even to the extent to the taking the life of his assailant (11).

§ 64. **Defense of house.** A man is not authorized to fire a pistol on every invasion of his house. He ought, if he has reasonable opportunity, to endeavor to remove the

(11) State v. Middleham, 62 Iowa 150.

trespasser without having recourse to this last extremity. But making an attack upon a dwelling, especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle; and, therefore, in the eye of the law, it is equivalent to an assault. The right to defend the house extends to all the inmates and includes the right to defend against both real and apparent danger (12).

§ 65. **Defense of property.** A man is not justified in defending his property to the extent of taking human life unless the defense be in a case of an assault upon him by persons intending to rob him, which, of course, includes also an exposure of his person to danger. But one who has been wrongfully deprived of his property may justify an assault and battery to recover it if the recaption is attempted immediately. One having bought goods, a dispute arose as to the price, and he placed $20.00 and the goods side by side and told the seller to choose, whereon the latter took up the money, and said: "You owe me $1.55". The defendant then demanded his money, threw the seller down, and choked him until he gave up a pocket-book containing the money. On a prosecution for robbery and assault and battery the court held that the defendant was justified in doing as he did if the force he used was not excessive (13).

§ 66. **Defense of a friend or stranger.** The rule is as old as the common law that the master may defend the servant, the servant the master, the husband the wife,

(12) Pond v. People, 8 Mich. 150.

(13) Commonwealth v. Donohue, 148 Mass. 529.

the parent the child, the child the parent, and so forth; but the courts have also gone further and held that what a man may do for himself another may do for him, and no more. "The appellants Renzy and Harmon Stanley, seek to excuse the killing of Rufus Ebling upon the ground that it was done by them to save the life of William Stanley, who is the brother of the one, and the uncle of the other. It is a general rule that whatever a person may lawfully do in his own defense, another may do for him. * * * This other person in such a case steps into the place of the assailed, and there attaches to him, not only the rights, but also the responsibilities of the one whose cause he espouses. * * * Thus, if A unlawfully assaults B endangering the latter's life, C has no right, because he may come upon the scene of conflict at a time when, during its progress, A is in danger, to kill B. This would be murder in C, just as it would in A. Any other rule could not be tolerated. The innocent cannot be sacrificed to save the guilty. This would be paradoxical. A volunteer must not kill in behalf of one in fault. This would be what some writers have termed a negligent killing. He may, however, do so for one not in fault, if the impending danger thus brought about be either actual or apparent. In other words, as the person not in fault may, if he believed and has reasonable grounds to believe that his life is in immediate danger, defend it to the extent of taking life, so another may act upon the like appearances as to such danger, and defend it for him to the same extent. * * * It is evident that

it (the instruction to the jury) confined the right of the appellants to act in defense of William Stanley's life to the existence of actual danger to it. It did not allow them to act in good faith upon appearances, however reasonable'' (14).

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(14) Stanley v. Commonwealth, 86 Ky. 440.

CHAPTER V.

THE PARTIES TO A CRIME.

§ 67. **Parties classified.** The possible persons participating in a crime are those who do the act themselves; those who give present aid; those who advise, plan, or aid in advance; and those who assist in stifling the prosecution or aid the escape of the criminal. Therefore the parties are: (1) Principals, (a) in the first degree, and (b) in the second degree: (2) Accessories, (a) before the fact, and (b) after the fact.

§ 68. **In treason and misdemeanors all are principals.** The classification given above applies only to felonies, for in treason any person participating in any way is considered a principal because of the enormity of the offense. On the other hand, in the case of misdemeanors all are considered as principals. One who incites others to commit an assault and battery is a principal and may be prosecuted as such, if the offense be actually committed, although he did not otherwise participate, and was not present at the time. There are a few minor crimes, mostly statutory, in which the offense is so mild that persons merely procuring the commission of it are not punished at all. For example, although the law forbids the sale of intoxicating liquors on Sunday or a holiday, a person who goes and purchases liquor contrary to law, and thereby induces the saloon keeper to sell it, is not liable to prosecution as an accessory before the fact,

nor as a principal inducing the sale and being present and giving assistance.

§ 69. **Principals in the first degree.** Ordinarily where there are several persons committing the crime and they are not liable in the same degree, the principal in the first degree is the one who actually does the crime with his own hand. But it is not necessary in order to convict one as principal in the first degree that he shall have committed the act in person, nor even that he was present at the time when it was committed. If one sets a trap, a spring gun, or poison, with design to kill another, and the other is injured thereby, he is a principal in the first degree, and liable to punishment accordingly; for otherwise there would be the anomaly of a crime without a criminal. Likewise, one who prepares and sets poison at the instigation of another is the principal in the first degree; and the other who merely advises is an accessory before the fact. Where the commission of the crime consists of a series of acts and each of the acts is performed by a different person, each is a principal and liable as such, though none were present during the whole transaction. This is illustrated by the case of a gang who made counterfeit money, one preparing the paper, one making the dies, one forging the signatures, and each acting separately. One may also be a principal, though the act is done by another person, provided the person doing the act is innocent. If one gives poison to be taken to another as medicine, and the person delivering it is not aware of its poisonous character, he is, of course, innocent though he gives the poison and death results. The person prescribing the poison is a principal in the

first degree in this case, though he acts through a conscious agent, and is not present at the time of the act.

§ 70. **Principals in the second degree.** A principal in the second degree is one who, though not performing the main act in the crime, is near enough at the time of the commission to give the principal actor encouragement or positive aid and assistance. By the most ancient common law as it was generally understood, those persons only were considered as principals in murder who actually killed the man, and those who were present aiding and abetting were considered as accessories. But the law was otherwise settled at an early day, and it was adjudged that he who was present, aiding and abetting, was to be considered as actually killing as much as if he had given the deadly blow. To convict one as principal in the second degree it must be proved that he was in such a position by agreement with the perpetrator of the crime, or with his previous knowledge and assent, for the purpose of rendering aid and encouragement in the commission of it. But if the abettor was consenting to the crime and in a situation in which he might render aid if necessary, it would follow as a necessary legal inference that he was actually abetting in the crime. The presence of the abettor under such circumstances must encourage and embolden the perpetrator, and this is sufficient assistance. A highway robber who placed himself at a point of advantage, where he could see the approach of the stage coach at a distance, and by signals informed his companions of the fact, was held liable as a principal in the second degree. Likewise one who knew that a store

was to be robbed and by agreement invited the proprietor to a dance to keep him away from the store while it was being robbed, was considered liable as a principal in the second degree though not near enough to know when the crime was committed, his part being to watch the owner (1).

§ 71. **Accessory before the fact.** An accessory before the fact is one who plans it in advance or gives assistance beforehand to the principal. One essential of an accessory before the fact is that he shall not be present, or within distance to give assistance at the time of the act; otherwise he would be a principal in the second degree.

§ 72. **Accessory after the fact.** An accessory after the fact is one, who, knowing a felony to have been committed by another, aids the felon to avoid punishment. The reason on which the common law makes a party in such a case a criminal, is that the course of public justice is hindered, and justice itself is evaded by facilitating the escape of the felon. To constitute one an accessory after the fact three things are requisite: 1. The felony must have been committed. 2. He must know that the felony had been committed. 3. He must receive, relieve, comfort, or aid the felon. The notice must be direct, or at least actual. The relief given to the felon must be such as aids him to escape, as by concealing him, shutting the door in the face of his pursuers, furnishing him a horse to get away, suppressing the testimony against him, inducing the witnesses not to testify, furnishing him with money and the like. It is not enough

(1) Breese v. State, 12 Ohio St. 146.

that his bodily wants shall have been supplied, as by giving him food and shelter, if these do not assist him in concealment or escape.

§ 73. **Liable for what acts of others.** In order that one person shall be liable for the criminal act of another, it must appear that there was some complicity between them, that they had some common design, and that the crime charged was committed in an attempt to further that design or as a natural consequence of it. If two persons agree upon a crime and one of the parties turns aside to commit a wholly independent crime, the other is not responsible for that. But where three parties planned a burglary, two going inside of the building, and the other keeping watch on the outside, all were held liable criminally for homicide resulting from opposition by the guard and the attempt of one to escape by shooting him (2).

§ 74. **Abandonment.** If one plans the crime with another, the mere fact of planning constitutes a conspiracy which no subsequent repentence will excuse. But if any of the parties repents of the act and notifies his companions of his retraction before the act is committed he is not liable criminally for the act, although they proceed to its execution. In this case the notice given to his companions may be by word or act, but it should be so unequivocal that there is no danger of his prior agreement furnishing encouragement to the others at the time the act is committed.

§ 75. **Principal must be first convicted.** Formerly, if

(2) Ruloff v. People, 45 N. Y. 213.

a man was indicted as accessory to the same crime with two or more persons, he could not be arraigned till all the principals were convicted and attainted; and in order to try an accessory when only one of the principals had been convicted, it was necessary to indict and arraign him as accessory to that one only. The modern decisions have somewhat modified this rule, but it seems clear that the accessory cannot now be put on trial as accessory to any who have not yet been convicted, unless he waives the defense. If the conviction of the principal has become impossible by his death, still the accessory could not be put to trial; for it may be that the principal if living could make a good defense. The reason for the rules above stated is that unless there is a principal there cannot be an accessory.

CHAPTER VI.

JURISDICTION.

§ 76. What courts have jurisdiction of crimes in a particular place. Every nation has jurisdiction to punish crimes committed within its territory, and may prescribe what courts shall have jurisdiction of each particular offense. The ships of each nation are considered as floating territory, over which they have jurisdiction, regardless of the nationality of the persons committing the crime on the ship, or the place where the ship may be, providing the law of the country whose flag it floats warrants the prosecution. On this ground it was held that an English court could punish an American citizen for a murder committed on a British boat in a river in France 90 miles from the sea (1). It is also clear that every country may assume jurisdiction of crimes committed within its own waters, which, by the law of nations, includes at least so much of the sea as lies within three miles of shore, and all bays and gulfs within headlands less then six miles apart (2).

§ 77. If wrong in one place takes effect in another. The criminal may be punished for his act at the place where it takes effect, regardless of where he was at the time he set the force in motion which resulted in the

(1) Queen v. Anderson, 11 Cox Crim. Cases 198.

(2) Manchester v. Massachusetts, 139 U. S. 240.

wrong. One who writes a libel in a foreign country may be punished criminally for it at any place where it may be published. One who practices a fraud through the mails or by innocent agents may be punished at any place where the fraud is perpetrated, regardless of where he was at the time he mailed the letter or planned the fraud. A shot fired from one jurisdiction and killing a man in another renders the person firing the shot liable for murder at the place where the shot took effect.

§ 78. **Injury inflicted in one place and victim dies in another.** In the early days of the common law the witnesses to the act were the jury to try the offense, and it was an established principle that a man was entitled to trial by a jury of the vicinage. The sheriff was bound to summon the jury from among the inhabitants of the county. From these rules it resulted that if a man was shot in one county and went to another and died, the slayer could not be convicted of the murder at all; because the jury where he was injured could not know of his death, and the jury where he died could not inquire of the injury. To avoid this difficulty the officers resorted to the practice of carrying the dead body to the county where the wrong was committed, so that the jury could find both facts,—the injury and death. It was also provided by an early statute (2 & 3 Edw. VI. c. 24) that the offender might be punished within the county where the death occurred though the injury was inflicted in another county. In a number of states in this country it has been provided by statute that if a person is injured in a foreign country or state, and comes within that state and dies,

the person inflicting the injury may be punished for the crime where the death occurs; and these statutes have been held constitutional (3). It has also been held that under a statute authorizing the trial of the offender in the county where the injury is inflicted, he may be tried there though the victim goes to a place out of the state and dies (4).

(3) Commonwealth v. Macloon, 101 Mass. 1.
(4) Stout v. State, 76 Md. 317.

PART II.

SPECIFIC CRIMES.

§ 79. **Outline.** Having considered the principal questions concerning the law of crimes in general in the first part of this article, we come now to consider the particular crimes and the minor and more minute rules concerning the several crimes. Because of the fact that there are certain crimes that very much resemble each other, and are therefore to a certain extent governed by the same rules, it will aid very much in the proper understanding of the law if we consider like crimes together or as nearly so as may be; and for this purpose the following classification has generally been made by writers upon this subject: (1) Crimes against the person; (2) crimes against the habitation; (3) crimes against property rights; (4) crimes against the public peace; (5) crimes against the general welfare (public morals, health, safety and comfort); (6) crimes against the administration of public justice and authority; (7) treason—threatening the existence of the government; (8) piracy—an offense against all nations. We shall consider these in their order.

CHAPTER VII.

CRIMES AGAINST THE PERSON.

§ 80. Outline. The following are the principal crimes against the person: (1) simple assault; (2) assault aggravated by intent to do some greater injury than battery: (3) assault coupled with battery, which makes assault and battery; (4) false imprisonment; (5) kidnaping; (6) maim or mayhem; (7) rape; (8) homicide. We will consider these in their order, from the least to the greatest.

Section 1. Simple Assault.

§ 81. Defined. It is impossible to give a satisfactory simple definition of assault for the reason that three different offenses are each known and commonly spoken of as assault; these offenses are as follows: (a) An attempt unlawfully to apply any or the least force to the person of another, directly or indirectly; (b) the act of using a gesture toward another giving him reasonable grounds to believe that the person using such gesture means to apply such actual force to his person as aforesaid; (c) the act of depriving another of his liberty, in either case without the consent of the person assaulted or with such consent if it is obtained by fraud. An assault is any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness; as by striking

at him, or even by holding up one's fist at him in a threatening or insulting manner, or with other circumstances as denote at the time an intention, coupled with a present apparent ability, to use actual violence against his person; as by pointing a weapon at him within the reach of it. Where the injury is actually inflicted, it amounts to a battery (which includes an assault), and this, however, small it may be; as by spitting in a man's face, or any way touching him in anger without any lawful occasion. But if the occasion were merely accidental and undesigned, or if it were lawful, and the party used no more force than was reasonably necessary to accomplish the purpose, as to defend himself against a prior assault, or to arrest the other, or make him desist from some wrongful act or endeavor, or the like; it is no assault or battery in the law, and the party may justify the force; and any matter in justification or excuse, such as self-defense, may upon an indictment be given in evidence under the general issue, not guilty; and the defendant who is charged with assault and battery, may be found guilty of the assault and acquitted of the other. The plea of self-defense is avoided if the defendant took advantage of a pretext to wreak vengeance and inflict a punishment wholly out of proportion to the provocation given. What would otherwise be an assault from the threatening attitude in which it is made may amount to no assault because of the words of explanation given at the time; as in the case of the man who approached another in a threatening attitude and said: "If the judges were not in town I would not take that from you."

Section 2. Aggravated Assault.

§ 82. **Fear, ability, and intention.** It is not essential to an assault that the person assaulted should have been actually put in fear, if the intention of the defendant was to threaten him; nor is it necessary that the defendant should have actually intended to execute his threat. It is not necessary that the threat made shall be within striking distance. It is enough that the person assaulted was compelled to flee to avoid injury. Ability to inflict injury is not necessary to an assault, provided there was apparent present ability.

§ 82a. **In general.** In the original common law there were no distinct degrees of assault. The offense might be more or less aggravated, and, in exercising his discretion as to the punishment, the judge would take into consideration the enormity of the offense; but there was only one crime, assault, for which the offender might be fined and imprisoned. But in the course of seven centuries a multitude of statutes were enacted providing special penalties for certain assaults; and many of these statutes would be part of the common law in this country, having been enacted before the settlement of this country. Among these statutes may be mentioned 25 Edw. III, de preditionibus, by which the ancient statute making it a capital offense to draw a sword in the king's court was modified so as to require the amputation of the hand of the culprit for an assault made in the presence of the courts of king's bench, common pleas, chancery, or assize, while in session; 33 Hen. VIII, c. 12, providing the penalty of perpetual imprisonment for assault with draw-

ing of blood in the king's presence; and in addition to these, many statutes, English and American, have been enacted providing special penalties for assaults made with intent to commit some greater crime, such as murder, rape, or maim. In some of these statutes the offense is made complete as soon as the attempt is made; under others, as in the case of drawing blood in the presence of the king, it is necessary to show an actual battery. The statutory intent is also essential. If the offense is assault with intent to murder, the charge is not sustained by proof of assault with intent to commit manslaughter. If the offense is assault with intent to kill, it is not enough to show that an instrument was used which might have resulted in death, unless, from its use and other circumstances, the jury are satisfied that the accused intended that death should result. It would seem that any evidence that would sustain an indictment under a statute making an assault with intent to kill a special crime, would sustain a charge of attempt to murder or to commit manslaughter, as the case might be, at common law.

Section 3. Battery.

§ 83. **Defined.** Any unlawful touching of the person of another by the aggressor himself, or by any substance put in motion by him is a battery. By this definition it is an essential prerequisite that the person either be touched by the aggressor himself or by the substance put in motion by him. There must be touching of the person; but one's wearing apparel is so intimately connected with the person as in law to be regarded a part of

it, and so is his cane or anything connected with his person. To strike the horse on which the person is riding would be a battery of a person. It has even been assumed that to strike the horse a person is riding after would be a battery because the horse, carriage, and person are so intimately connected.

Section 4. False Imprisonment.

§ 84. Defined. False imprisonment is any unlawful restraint of one's liberty, whether in a place set apart for imprisonment generally or used only for the particular occasion, whether between walls or not, effected either by physical force actually applied, or by words and an array of force. What is a legal justification of the imprisonment, may be given in evidence under a plea of not guilty, upon an indictment for such assault, for a false imprisonment is merely an aggravated assault. The offense is a misdemeanor punishable usually by fine, imprisonment, or both.

Section 5. Kidnapping.

§ 85. Defined. The most aggravated species of false imprisonment is the stealing and carrying away or secreting of any person, which is an offense at the common law punished by fine and imprisonment. But by statute of 43 Eliz., c. 13, the offense was made a felony punishable by death.

Section 6. Maim, or Mayhem.

§ 86. Defined. A maim at common law is such a bodily hurt as renders a man less able in fighting to defend him-

self or annoy his adversaries; but if the injury be such as disfigures him only, without diminishing his physical ability, it does not fall within the crime of maim. Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or tooth, or castrating him, is maim. But the cutting off his ear or nose is not such at common law. By the ancient law of England he that maimed another was sentenced to lose the member like that of which he had deprived the other; but as this was a barbarous legal retaliation, suitable only to a crude state of society, and further because the punishment could not be repeated on a repetition of the offense, it did not long endure. The crime and punishment were modified by a multitude of statutes in England; and in most cases the punishment was finally reduced to fine and imprisonment. In this country it has been much debated whether the crime is a felony in the absence of a statute declaring it so.

Section 7. Rape.

§ 87. **Defined.** Rape consists in a man's having unlawful carnal knowledge of a woman without her consent. Another woman or a person physically incompetent to commit the offense himself in the first degree may be a principal in the second degree. The woman's husband may be a principal in the second degree to the rape of his wife by another man; but could not be guilty of the crime himself, because of the legal consent given by the woman at marriage.

§ 88. **Without consent.** A man may be guilty of rape

of a woman who does not make any opposition to him. It is not essential that it shall be against her will; it is enough that it is without her consent. Therefore, it was held that the man was guilty of rape who found a woman insensibly drunk by the roadside and violated her person without her knowledge, while she was in that drunken and stupefied condition (1). For the same reason it has been argued that one who obtains intercourse with a woman by impersonating her husband is guilty of rape, though she consented to the act. The majority of the decisions seem to be against this doctrine, though it would seem to be sustained by logic, the woman having consented to a lawful act and the defendant having committed the crime of adultery, which was not the act consented to. If the woman was conscious and recognized the defendant but made no opposition the presumption would be, she having ability to consent, that she did consent to his act. If she did not resist to the extent of her ability it would also be presumed that she consented, but the resistance of which a woman would be capable under circumstances of fright would be the question, not what she could do when not prostrated nor scared. Statutes provide in the several states that sexual intercourse with women under certain ages shall be considered rape, though with the consent of the girl, for the reason that she has not sufficient discretion to realize the nature of the act. The age thus fixed has varied all the way from 12 to 18 years.

§ 89. **When crime is complete.** There was a considerable debate a little over a hundred years ago in the courts

(1) Commonwealth v. Burke, 105 Mass. 376.

as to whether the offense was complete on penetration only, or only upon emission; but it was finally settled that penetration only was sufficient. The violation of the woman is complete without more, which would seem to have been reason enough to settle the point; but the judges seem to have been influenced also by the difficulty of proof. The slightest penetration is sufficient. If the woman gave up opposition afterwards or even forgave the offense, that would not be a defense.

§ 90. **Who can be violated.** The crime may be committed on one who has been guilty of previous voluntary intercourse with the defendant, or even though she be a common strumpet; for it would be monstrous that one who had once fallen could not reform, and that one who had yielded her virtue should therefore be subject to violation against her will and with impunity.

§ 91. **Proof of rape.** Sir Matthew Hale said: "It is true that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easy to make, hard to be proved, but harder to be defended by the party accused, though innocent." (1 Hale P. C. 635.) He then mentioned two extraordinary cases that occurred in his own observation, of malicious prosecutions of innocent persons for rape; and he cautions judge and jury not to be too hastily carried away with indignation at the accused and sympathy for the prosecutor, but to listen dispassionately to the testimony. The party ravished is a competent witness, though her husband be among those accused; but her testimony ought always

to be weighed by the circumstances, her former repute, her conduct about the time and after, her opportunity to have called assistance when assaulted, whether she made outcry, how soon she made complaint afterwards, whether her relations with the accused were intimate before, or there were occasion for spite or jealousy afterwards; and, in fact, all the circumstances of the case should be carefully weighed.

Section 8. Homicide.

§ 92. **Definition and classification.** Homicide is the killing of a human being by a human being. Homicides are of two kinds: (1) justifiable or excusable(which we considered in § 60 to § 66 inclusive, above); and (2) felonious. Felonious homicide is homicide without justification or excuse, in which death results within a year and a day after the injury, and is either (1) murder, or (2) manslaughter. Manslaughter is either (a) voluntary, or (b) involuntary. If death does not result within a year and a day the law presumes that it resulted from some other cause than the injury inflicted.

§ 93. **Murder defined.** Murder is homicide with malice aforethought. Malice aforethought is a technical term with a historic meaning in law entirely different from the popular meaning. In substance it is any state of mind and circumstances which in the history of the law has been held to render, and, therefore, is now deemed to constitute the homicide a murder. It is spoken of as a state of mind depraved, devoid of the sense of social duty, and fatally bent on evil. The reader will compre-

hend its nature, perhaps, by an enumeration of the principal classes of cases in which the killing has been held to be with malice aforethought and therefore the crime murder. At the common law there were no degrees of murder, but by statutes, which differ somewhat in the several states, it has been declared to be murder in the first degree to kill another deliberately and premeditatedly as, (1) by lying in wait, poisoning, etc.; (2) by any act intended to produce death and not done in the heat of extreme passion caused by sufficient provocation. The other common law murders are often declared by statute to be murder in the second or in the third degree, and are as follows: (3) by any act dangerous in itself and showing a reckless disregard of human life and safety, as with a deadly weapon; (4) unintentionally resulting from an attempt to commit another felony; and, (5) unintentionally resulting from unlawfully opposing an officer or other person engaged in arresting or keeping custody of a prisoner. The malice which is manifested by an actual intention to kill is known as express malice. Where the death results accidentally as in the last three cases above named, the malice is considered as implied in law. The cases of express malice are too clear to warrant further discussion, but it will be instructive to consider the cases of implied malice separately.

§ 94. **Reckless murder.** Where the death was not intended but the conduct of the accused is such as to show that he had no such regard for human life as a person without malice would have, his act is punished as murder. Of this class of murders an old case will furnish

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a good illustration. On trial of John Grey, at Old Bailey, on indictment for murder, the jury found specially that the prisoner was a blacksmith, and commanded Golding, his servant, to mend some straps, part of his trade; and, coming in, finding it not done, Grey asked why, and said if Golding would not serve him he should serve in Bridewell; to which Golding said he would as well as serve Grey; on which, without other provocation, Grey struck him with a bar of iron Grey had in his hand, on which he and Golding were working at the anvil. This blow broke his skull and he died; and if this was murder, was the question. All the judges were of opinion that it was murder; for if a father, master, or schoolmaster, will correct his child, servant, or scholar, they must do it with such things as are fit for correction, and not with such instruments as may probably kill them; for otherwise, under pretense of correction, a parent might kill his child, or a master his servant, or a schoolmaster his scholar; and a bar of iron is no instrument for correction. It is all one as if he had run him through with a sword. The judges remembered several cases at assizes in which like acts had been held murder. Therefore, when a master strikes his servant willingly with such things as these and death ensues, the law will judge it of malice prepense (2).

§ 95. **Murder in opposing an officer.** If, upon an affray, the constable and others in his assistance come to suppress the affray and preserve the peace, and in executing their office the constable or any of his assistants

(2) Grey's Case, Kelyng 64.

is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden; because the constable and his assistants came by authority of law to keep the peace, and prevent the danger that might ensue by a breach of it; and, therefore the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the officers of the law. So if the sheriff or any of his bailiffs or other officer is killed in executing the process of the law, or in doing their duty, it is murder; the same is the law if a watchman is killed in executing his office.

§ 96. **Murder of the peacemaker.** If a private citizen endeavor to restore the peace by separating persons who are fighting, and he notifies them in advance that he comes not to enter the fight but to stop it, and if either of them turn upon him and kill him, this is murder, whether they intended to kill or not, for he is considered as in the shoes of the peace officer for the purpose. But if he does not notify them of his purpose and they kill him, it is not murder; for they might well assume that he came to enter the fight.

§ 97. **Accidental murder in an attempted felony.** If death results from a wrong done which does not amount to a felony it is not murder unless the defendant was guilty of such negligence as manifests a depraved mind and a reckless disregard for human life. But if a person designs to commit a felony, and, in attempting to execute this design, death of any person results, he is liable for murder, it has been said, though he did no act

indicating a reckless disregard for human life; for the malice implied from the felony he intended supplies the place of the malice expressed by intentional murder.

§ 98. **Same: Illustrations.** Illustrations of murder resulting from attempting another felony are furnished by the cases already cited of Taylor v. State, § 17 and Gore's Case, § 31. This rule cannot otherwise be so well expounded as by quoting at length from a celebrated English case (3) in which Mr. Justice Stephen, a man of international repute for his learning on the law of crimes, recognizes and criticizes this doctrine in his instruction to the jury on a trial for murder of two boys by burning the house in which they were sleeping, the object of the defendants being to defraud the insurance company. The following is from this instruction:

"Gentlemen, it is now my duty to direct your attention to the law and the facts into which you have to inquire. The two prisoners are indicted for the wilful murder of the boy Sjaak Serne, a lad of about fourteen years of age; and it is necessary that I should explain to you, to a certain extent, the law of England, with regard to the crime of wilful murder, inasmuch as you have heard something said about constructive murder. Now that phrase, gentlemen, has no legal meaning whatever. There was wilful murder according to the plain meaning of the term, or there was no murder at all in the present case. The definition of murder is unlawful homicide with malice aforethought, and the words "malice afore-

(3) Regina v. Serne, 16 Cox Cr. Cases 311.

thought'' are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed. One of those meanings is, the killing of another person by an act done with an intent to commit a felony. Another meaning is, an act done with the knowledge that the act will probably cause the death of some person. Now it is such an act as the last which is alleged to have been done in this case; and if you think that either or both of these men in the dock killed this boy, either by an act done with intent to commit a felony, that is to say, the setting of the house on fire in order to cheat the insurance company, or by conduct which to their knowledge was likely to cause death and was therefore eminently dangerous in itself,—in either of these cases the prisoners are guilty of wilful murder in the plain meaning of the word. I will say a word or two upon one part of this definition, because it is capable of being applied very harshly in certain cases, and also because, though I take the law as I find it, I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this, that is to say, a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart or some other internal disorder, dies. To take another

very old illustration, it was said that if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or whether the court for the consideration of crown cases reserved would hold it to be so. The present case, however, is not such as I have cited, nor anything like them. In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, while that part of the law under which the crown in this case claims to have proved a case of murder is maintained. I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her; that would be murder. I think that every one would say, in a case like that, that when a person began doing wicked acts for his own base purposes, he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes

further than he intended when he began. That I take to be the true meaning of the law on the subject. In the present case, gentlemen, you have a man sleeping in a house with his wife, his two daughters, his two sons, and a servant, and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places and thereby burnt two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that if that were really done, it matters very little indeed whether the prisoners hoped the people would escape or whether they did not. If a person chose, for some wicked purpose of his own, to sink a boat at sea, and thereby caused the deaths of the occupants, it matters nothing whether at the time of committing the act he hoped that the people would be picked up by a passing vessel. He is as much guilty of murder, if the people are drowned, as if he had flung every person into the water with his own hand. Therefore, gentlemen, if Serne and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burnt to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think, in so saying, the law of England lays down a rule of broad, plain common-sense."

§ 99. **Voluntary manslaughter: What is provocation?** Voluntary manslaughter is homicide committed intentionally in the heat of passion produced by extreme provo-

cation. It will be noticed that intentional homicide is not necessarily murder; but if committed on the spur of the moment when anger from sufficient cause has displaced reason, the law makes some allowance for the frailty of human nature by declaring the crime less than murder, and inflicting a lighter penalty. What is a sufficient provocation has been much debated. It has long been settled that no mere words can amount to sufficient provocation. When a man struck his wife dead upon her telling him insultingly that he was not the father of her children, the court held that neither the words nor their combination with the disgraceful news they disclosed were provocation to reduce the offense from murder to manslaughter (4). But when a man caught his wife in the act of adultery and dispatched the adulterer on the spot, the court held it to be manslaughter only, sentenced him to be burned in the hand, and cautioned the sheriff to do it very lightly because there could not be greater provocation (5). There being an affray in the street, a soldier ran toward the combatants. A woman cried out to him: "You will not murder the man, will you?" He replied: "What is that to you, you bitch?" She then gave him a box on the face and he struck her with his sword's pommel on the breast, whereon she fled, and he pursued her and stabbed her in the back. The judge was at first of opinion that this was murder, as the blow on the breast was sufficient return for a box on the ear from a woman, which would not be sufficient provo-

(4) Fry v. State, 81 Ga. 645.

(5) Manning's Case, 1 Hale P. C. 486.

cation for killing her in this manner. But when it appeared later that she struck him in the face with an iron patten and drew a great deal of blood, the court was clear in the opinion that it was manslaughter only, as the smart of the blow and the sight of the blood were sufficient to keep his indignation boiling to the moment of the act (6).

§ 100. **Same (continued).** This question received very learned discussion by Mr. Justice Christiancy in a case in the supreme court of Michigan (7), in which one who shot a man he had suspected of adultery with his wife was held entitled to have the question of provocation and passion submitted to the jury. The following is from the opinion of Mr. Justice Christiancy in this case: "It is not necessary here to enumerate all the elements which enter into the legal definition of malice aforethought. It is sufficient to say that, within the principle of all the recognized definitions, the homicide must, in all ordinary cases, have been committed with some degree of coolness and deliberation, or, at least, under circumstances in which ordinary men, or the average of men recognized as peaceable citizens, would not be liable to have their reason clouded or obscured by passion; and the act must be prompted by, or the circumstances indicate that it sprung from a wicked, depraved, or malignant mind—a mind which even in its habitual condition and when excited by no provocation which would be liable to give undue control to passion in ordinary men, is cruel, wanton, or ma-

(6) Rex. v. Stedman, Foster's Crown Law, 292.

(7) Maher v. People, 10 Mich. 212.

lignant, reckless of human life, or regardless of social duty.

"But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition,—then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.

"To what extent the passions must be aroused and the dominion of reason disturbed to reduce the offense from murder to manslaughter, the cases are by no means agreed; and any rule which should embrace all the cases that have been decided in reference to this point, would come very near obliterating, if it did not entirely obliterate, all distinction between murder and manslaughter in such cases. We must therefore endeavor to discover the principle upon which the question is to be determined. It will not do to hold that reason should be entirely dethroned, or overpowered by passion so as to destroy intelligent volition. Such a degree of mental disturbance would be equivalent to utter insanity, and if the result of adequate provocation, would render the perpetrator morally innocent. But the law regards manslaughter

as a high grade of offense,—as a felony. On principle, therefore, the extent to which the passions are required to be aroused and reason obscured must be considerably short of this, and never beyond that degree within which ordinary men have the power, and are therefore morally as well as legally bound, to restrain their passions. It is only on the idea of a violation of this clear duty, that the act can be held criminal. There are many cases to be found in the books in which this consideration, plain as it would seem to be in principle, appears to have been in a great measure overlooked, and a course of reasoning adopted which could only be justified on the supposition that the question was between murder and excusable homicide.

"The principle involved in the question, and which I think clearly deducible from the majority of well considered cases, would seem to suggest, as the true general rule, that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men of fair average disposition liable to act rashly, or without due deliberation or reflection, and from passion, rather than judgment.

§ 101. **Same (continued).** "To the question, what shall be considered in law a reasonable or adequate provocation for such state of mind, so as to give to a homicide committed under its influence the character of manslaughter? on principle, the answer as a general rule, must be, anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are

satisfied did produce it in the case before them—not such a provocation as must, by the laws of the human mind, produce such an effect with the certainty that physical effects follow from physical causes, for then the individual could hardly be held morally accountable. Nor, on the other hand, must the provocation, in every case, be held sufficient or reasonable, because such a state of excitement has followed from it; for then, by habitual and long-continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men, and on account of that very wickedness of heart which, in itself, constitutes an aggravation both in morals and in law.

"In determining whether the provocation is sufficient, reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard—unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition.

"It is, doubtless, in one sense, the province of the court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule, the court, after informing the jury to what extent the passions must be aroused, and reason obscured, to render

the homicide manslaughter, should inform them that the provocation must be one, the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find such provocation from the facts proved, and should further find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter.

"Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are, in my opinion, much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than is the judge whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life. * * *

"It remains only to apply these principles to the present case. The proposed evidence, in connection with what had already been given, would have tended strongly to show the commission of adultery by Hunt with the prisoner's wife, within half an hour before the assault; that the prisoner saw them going to the woods together, under circumstances calculated strongly to impress upon his mind the belief of the adulterous purpose; that he followed after them to the woods; that Hunt and the prisoner's wife were, not long after, seen coming from the

woods, and that the prisoner followed them, and went in hot pursuit after Hunt to the saloon, and was informed by a friend on the way that they had committed adultery the day before in the woods. I can not resist the conviction that this would have been sufficient evidence of provocation to go to the jury, and from which, when taken in connection with the excitement and 'great perspiration' exhibited on entering the saloon, the hasty manner in which he approached and fired the pistol at Hunt, it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which, within the principle already explained, would have given to the homicide, had death ensued, the character of manslaughter only. In holding otherwise the court below was doubtless guided by those cases in which courts have arbitrarily assumed to take the question from the jury, and to decide upon the facts or some particular fact of the case, whether a sufficient provocation had been shown, and what was a reasonable time for cooling."

§ 102. **What is cooling time.** As the provocation mitigates the offense only in case the act is done while reason is obscured and overcome by the passions, the difficult question in the case often is whether the act was done within sufficient time after the provocation was given. In speaking on this point, in the case last above cited, Mr. Justice Christiancy said:

"The same principles which govern, as to the extent to which the passions must be excited and reason disturbed, apply with equal force to the time during which its contin-

uance may be recognized as a ground for mitigating the homicide to the degree of manslaughter, or, in other words, to the question of cooling time. This, like the provocation itself, must depend upon the nature of man and the laws of the human mind, as well as upon the nature and circumstances of the provocation, the extent to which the passions have been aroused, and the fact whether the injury inflicted by the provocation is more or less permanent or irreparable. The passion excited by a blow received in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape committed upon a sister or a daughter, or the discovery of an adulterous intercourse with a wife; and no two cases of the latter kind would be likely to be identical in all their circumstances of provocation. No precise time, therefore, in hours or minutes, can be laid down by the court, as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very principle on which provocation and passion are allowed to be shown, at all, in mitigation of the offense. The question is one of reasonable time, depending upon all the circumstances of the particular case; and where the law has not defined, and cannot without gross injustice define, the precise time which shall be deemed reasonable, as it has with respect to notice of the dishonor of commercial paper. In such case, where the law has defined what shall be reasonable time, the question of such reasonable time, the facts being found by the jury, is one of law for

the court, but in all other cases it is a question of fact for the jury; and the court cannot take it from the jury, by assuming to decide it as a question of law, without confounding the respective provinces of the court and jury. * * * I am aware there are many cases in which it has been held a question of law, but I can see no principle on which such a rule can rest. The court should, I think, define to the jury the principles upon which the question is to be decided, and leave them to determine whether the time was reasonable under all the circumstances of the particular case. I do not mean to say that the time may not be so great as to enable the court to determine that it is sufficient for the passion to have cooled, or so to instruct the jury, without error; but the case should be very clear."

§ 103. **Involuntary manslaughter.** Involuntary manslaughter is unintentional homicide while engaged in doing an unlawful act not in itself sufficient to supply the implied malice to make the act murder. The unlawful act may be mere negligence in doing an act otherwise lawful, for example driving at a reckless pace in the street, operating machinery in a dangerous manner or without the precautions which ordinary prudence would indicate to be necessary, allowing a vicious bull to run at large, and so forth. A physician who gives medicine with the intent to cure is not liable criminally if it results fatally unless he was so grossly negligent or ignorant of matters of common knowledge in his profession that he should have known it would be likely to prove fatal. The caution which the law requires in all these cases is not the utmost

degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end. Wharton, in his treatise on Criminal Law (page 382), says: "There are many cases in which death is the result of an occurrence in itself unexpected, but which arose from negligence or inattention. How far, in such cases, the agent of such misfortune is to be held responsible, depends upon the inquiry whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes, and the degree of caution requisite to bring the case within the limits of misadventure must be proportioned to the probability of danger attending the act immediately conducive to the death."

§ 104. Same: Illustration. The rule in such cases is well illustrated by a case that arose in Iowa. The defendant was a boarder in the family of one Gantz. On the day of the homicide, Mrs. Sutfen, a neighbor, called at the house, and after some friendly conversation, she went into the kitchen. When she came back defendant picked up a tack hammer and struck on the door. She said, "My God, I thought it was a revolver." A short time afterwards she went into the yard to get a kitten. Defendant said he would frighten her with the revolver as she came in. He took a revolver from a stand drawer and went out of the room, and was in the kitchen when the revolver was discharged. He immediately came in and said to Mrs. Gantz, his sister, "My God, Hannah, come and see what I have done." His sister went out and found Mrs. Sutfen lying on the sidewalk at the side of the house, with a gun-

shot wound in the head, and in a dying condition. The revolver had been in the house for about five years. It was found by Gantz in the road. There was one load in it when found. Some six months after it was found Gantz tried to shoot the load from it and it would not go off. He tried to punch the load out, but could not move it. He then laid it away, thinking it was harmless. The defendant was about the house and knew the condition of the revolver. Upon one occasion Gantz said he would try to kill a cat with the revolver. Defendant being present said he would not be afraid to allow it to be snapped at him all day. The revolver remained in the same condition that it was when found, no other load having been put into it, and it was considered by the family as well as defendant as entirely harmless. The State did not claim that the defendant was guilty of murder, but that he was guilty of manslaughter because of criminal carelessness. The defendant insisted that there was no such carelessness as to render the act criminal, and that it was homicide by misadventure, and therefore excusable. The court instructed the jury that if they found the facts above stated there was criminal negligence and the defendant was guilty of manslaughter. The supreme court sustained the conviction as proper (8).

§ 105. The evidence and proof in homicide cases. In order to convict there must be proof that someone is dead, —that death was criminally induced, and that the accused is the guilty party. The burden is on the prosecution to establish these facts and all of them to a moral certainty,

(8) State v. Hardie, 47 Iowa 647.

or, as it is commonly expressed, beyond a reasonable doubt. This proof may be by the direct testimony of persons who saw the acts, or by indirect and circumstantial evidence, or partly by one and partly by the other. It is believed that the law of this subject can be best explained by giving an extended quotation from the instructions to the jury in the celebrated trial of Dr. Webster of Harvard, for the murder of Dr. Parkman (9) who was seen going towards Dr. Webster's laboratory in the medical college about 1:45 p. m., Nov. 23, 1849, and was never seen afterwards. Diligent search was made in and about Boston and vicinity, but he could not be found. Five witnesses testified on the trial to have seen him after this time, but they were not well acquainted with him, and had no occasion at the time to take special notice. Suspicion being cast on Dr. Webster, his laboratory was searched. In the furnace were found bones like those of Dr. Parkman, which could not have been part of a body dissected at the college, for they had not been chemically treated. It was shown that Dr. Webster was indebted to Dr. Parkman, had promised to meet and pay him at the college at that time, then had no means to pay, and the note was afterwards found in his possession.

§ 106. **Same (continued).** The following instruction was given to the jury by Chief Justice Shaw of the supreme court, after consultation with all the other judges: "The rule, as deduced from the authorities, is that the implication of malice arises in every case of intentional homicide; and, the fact of killing being first proved, all

(9) Commonwealth v. Webster, 5 Cushing 295.

the circumstances of accident, necessity, or infirmity, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon, likely to kill and which does in fact destroy the life of the party assailed, the natural presumption is, that he intended death or other great bodily harm; and, as there can be no presumption of any proper motive or legal excuse for such a cruel act, the consequence follows, that, in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice. * * * The prisoner at the bar is charged with the wilful murder of Dr. George Parkman. This charge divides itself into two principal questions, to be resolved by the proof: first, whether the party alleged to have been murdered came to his death by an act of violence inflicted by any person; and if so, secondly, whether the act was committed by the accused. Under the first head we are to inquire and ascertain, whether the

party alleged to have been slain is actually dead; and, if so, whether the evidence is such as to exclude, beyond reasonable doubt, the supposition that such death was occasioned by accident or suicide, and to show that it must have been the result of an act of violence. When the dead body of a person is found, whose life seems to have been destroyed by violence, three questions naturally arise. Did he destroy his own life? Was his death caused by accident? Or was it caused by violence inflicted on him by others? In most instances, there are facts and circumstances surrounding the case, which, taken in connection with the age, character, and relations of the deceased, will put this beyond doubt. * * *

"This case is to be proved, if proved at all, by circumstantial evidence; because it is not suggested that any direct evidence can be given, or that any witness can be called to give direct testimony, upon the main fact of killing. It becomes important, therefore, to state what circumstantial evidence is; to point out the distinction between that and positive or direct evidence; and to give some idea of the mode in which a judicial investigation is to be pursued by the aid of circumstantial evidence.

"The distinction, then, between direct and circumstantial evidence, is this. Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and

of course that no one can be called to testify to it; is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character, as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act, in relation to their most important concerns. It would be injurious to the best interests of society, if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

"The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is therefore necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and, thanks to a beneficent providence, the laws of nature and the relations of things to each other are so linked and combined together, that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony. * * *

" 'Perhaps strong circumstantial evidence, in cases of crimes like this, committed for the most part in secret,

is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous' (10). Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done, and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood.

"But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question, that in the relation of cause and effect, they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence,

(10) East's Pleas of the Crown, c 5, § 11.

therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.

"From this view, it is manifest, that great care and caution ought to be used in drawing inferences from proved facts. It must be a fair and natural, and not a forced or artificial conclusion; as when a house is found to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is that the house was broken open, and that the persons who broke open the house plundered the property. It has sometimes been enacted by positive law, that certain facts proved shall be held to be evidence of another fact; as where it is provided by statute, that if the mother of a bastard child gives no notice of its expected birth and is delivered in secret, and afterwards is found with the child dead, it shall be presumed that it was born alive and that she killed it. This is a forced and not a natural presumption, prescribed by positive law,

and not conformable to the rule of the common law. The common law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It is not sufficient that it is probable only; it must be reasonably and morally certain.

§ 107. **Same (continued).** "The next consideration is, that each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence. I say, every fact necessary to the conclusion; because it may and often does happen, that, in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it and not repugnant, and go to rebut any contrary presumption. As in the present case, it was testified by a witness, that, the day before the alleged homicide, he saw Dr. Parkman riding through Cambridge and inquiring for Dr. Webster's house; this evidence had a slight tendency to show that he was then urgently pressing his claim; but not being necessary to the establishment of the main fact, if the witness was mistaken in the time or in the fact itself, such failure of proof would not prevent the inference from other facts, if of themselves sufficient to warrant it. The failure of such proof does not destroy the chain of evidence; it only fails to give it that particular corroboration, which the fact if proved, might afford.

"So to take another instance arising out of the evidence

in the present case. The fact of the identity of the body of the deceased with that of the dead body, parts of which were found at the medical college, is a material fact, necessary to be established by the proof. Some evidence has been offered, tending to show, that the shape, size, height, and other particulars respecting the body, parts of which were found and put together, would correspond with those of the deceased. But inasmuch as these particulars would also correspond with those of many other persons in the community, the proof would be equivocal and fail in the character of conclusiveness upon the point of identity. But other evidence was then offered, respecting certain teeth found in the furnace, designed to show that they were the identical teeth prepared and fitted for Dr. Parkman. Now, if this latter fact is satisfactorily proved, and if it is further proved to a reasonable certainty, that the limbs found in the vault and the burnt remains found in the furnace were parts of one and the same dead body, this would be a coincidence of a conclusive nature to prove the point sought to be established; namely, the fact of identity. Why, then, it may be asked, is the evidence of height, shape, and figure of the remains found, given at all? The answer is, because it is proof of a fact not repugnant to that of identity, but consistent with it, and may tend to rebut any presumption that the remains were those of any other person; and therefore, to some extent, aid the proof of identification. The conclusion must rest upon a basis of facts proved, and must be the fair and reasonable conclusion from all such facts taken together.

"The relations and coincidences of facts with each other from which reasonable inferences may be drawn, are some of a physical or mechanical, and others of a moral nature. Of the former, some are so decisive as to leave no doubt; as where human footprints are found on the snow (to use an illustration already adduced), the conclusion is certain, that a person has passed there; because we know, by experience, that that is the mode in which such footprints are made. A man is found dead, with a dagger-wound in his breast; this being the fact proved, the conclusion is, that his death was caused by that wound, because we know that it is an adequate cause of death, and no other cause is apparent.

"We may also take an instance or two from actual trials. A recent case occurred in this court, where one was indicted for murder by stabbing the deceased in the heart, with a dirk-knife. There was evidence tending to show that the prisoner had possession of such a knife on the day of the homicide. On the next morning, the handle of a knife, with a small portion of the blade remaining, was found in an open cellar, near the spot. Afterwards, upon a post mortem examination of the deceased the blade of a knife was found broken in his heart, causing a wound in its nature mortal. Some of the witnesses testified to the identity of the handle, as that of the knife previously in the possession of the accused. No one, probably, could testify to the identity of the blade. The question, therefore, still remained, whether that blade belonged to that handle. Now, when these pieces came to be placed together the toothed edges of the fracture so

exactly fitted each other, that no person could doubt that they had belonged together; because, from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would so precisely match.

"So, an instance is mentioned of a trial before Lord Eldon, when a common-law judge, where the charge was of murder with a pistol. There was much evidence tending to show that the accused was near the place at the time, and raising strong suspicions that he was the person who fired the pistol; but it fell short of being conclusive,—of fastening the charge upon the accused. The surgeon had stated in his testimony, that the pistol must have been fired near the body, because the body was blackened, and the wad found in the wound. It was asked, by the judge, if he had preserved that wad; he said he had, but had not examined it. On being requested to do so, he unrolled it carefully, and on an examination it was found to consist of paper, constituting part of a printed ballad; and the corresponding part of the same ballad,—as shown by the texture of the paper and the purport and form of stanza of the two portions,—was found in the pocket of the accused. This tended to identify the defendant as the person who loaded and fired the pistol.

"These are cases where the conclusion is drawn from known relations and coincidences of a physical character. But there are those of a moral nature, from which conclusions may as legitimately be drawn. The ordinary feelings, passions, and propensities under which parties

act, are facts known by observation and experience; and they are so uniform in their operation, that a conclusion may be safely drawn, that if a person acts in a particular manner he does so under the influence of a particular motive. Indeed, this is the only mode in which a large class of crimes can be proved. I mean crimes, which consist not merely in an act done, but in the motive and intent with which they are done. But this intent is a secret of the heart, which can only be directly known to the searcher of all hearts; and if the accused makes no declaration on the subject, and chooses to keep his own secret, which he is likely to do if his purposes are criminal, such criminal intent may be inferred, and often is safely inferred, from his conduct and external acts.

"A few other general remarks occur to me upon this subject, which I will submit to your consideration. Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to

sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution.

"To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion, without just cause, on other persons: all or any of which tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. * * *

§ 108. **Same (continued).** "Another rule is, that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offense charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential, therefore, that the circumstances taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. The evidence must establish the corpus delicti, as it is termed, or the offense committed as charged; and, in case of homi-

cide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt.

"Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and

require absolute certainty, it would exclude circumstantial evidence altogether."

Defendant was found guilty, sentenced to death, and hanged. While in prison after the trial he confessed to the killing of Parkman.

CHAPTER VIII.

CRIMES AGAINST THE HABITATION.

Section 1. Burglary.

§ 109. **Defined.** Burglary at the common law is the breaking and entering of the dwelling house of another in the night-time with the intention of committing a felony therein. The above is the common definition; but as it is technical, and liable to be misunderstood, it is necessary to explain separately each word of the definition. Various other acts not coming within the above definition have been made burglary by statutes in the several states. These statutes extend to criminal breaking of buildings other than dwelling houses, and to breaking in the day-time. It will be noticed that the crime is complete on entry only, though the purpose afterwards fails or is abandoned.

§ 110. **Breaking.** The breaking of the building to constitute burglary may be actual or constructive. Actual breaking is the least opening of the building. If the door is held shut by its weight or by the friction of the hinges, it is a breaking to push it open. If a window is closed it is a breaking to lift the window. If the window is open and there is a mosquito-bar netting over the open space it is a breaking to cut or tear out the netting. The part broken into may be the outer door, an inner door, a win-

dow, or a hole in the wall; but to open the iron gate which leads only into the yard would not be a breaking of such a part as would constitute burglary. If the door or window is partly open it is said to hold out a temptation to the easily tempted, and to be such a negligence on the part of the owner that he should not be allowed to prosecute for the felony of burglary, if led by the temptation anyone breaks into the house. And yet if the outer door is open and the burglar enters through some other door, or, (by statute 12 Anne, c. 7.), if entering through an open door he breaks out through a closed one, it is burglary. Constructive breaking consists of getting in at a point that cannot be otherwise protected, or obtaining entry by fraud. It has been held in a number of cases that one who climbs down the chimney is guilty of breaking, because the chimney cannot by its nature be closed. If one by connivance with the servant in the house is let into the house at night to commit a felony therein, as larceny or adultery, this would seem to be burglary in both. A robber who knocks at the door as if someone had come to call on the inmates of the house is guilty of burglary, if they, being thus deceived, should open the door to him and he afterwards enters the house with felonious intent. One had himself enclosed in a box and sent by express from one town to another for the purpose of robbing the express, and this fraudulent entry into the express car was held a constructive breaking to make it a statutory burglary of an express car (1). One who lives in the house as servant and has a room there at night is

(1) Nicholls v. State, 68 Wis. 416.

guilty of breaking if he lifts the latch of the door to his master's chamber and opens the door at night with felonious intent.

§ 111. **Entering.** Like the breaking, the entry may be actual or constructive. Actual entry need not be of the whole body. Even the slightest entry of a finger is sufficient, as by inserting it through the hand-hole in the door to open it by lifting the latch, which would be a constructive breaking and actual entry, or by putting the ends of the fingers inside of the window-sash in attempting to lift the sash. If a burglar enters through the chimney it is not necessary that he get entirely into the house. When a burglar entered through the chimney and got down a little below the roof, and, because he could neither get further down nor get out, called for help, and the master of the house came and rescued him, it was held clearly burglary (2).

The entry may be made by inserting part of the person or by inserting any instrument with which to commit the felony. If the entry is by any part of the person it is not necessary that the particular entry be made for the purpose of committing the felony; it may be to open the way for a more general entry, by turning the latch, or the like. But if an instrument only is inserted it is not a burglarious entry unless the design was to commit the felony by the insertion of that instrument. Therefore when a crow-bar was put so far under the window sash to lift it that it left a mark on the window sill inside, the court held that no burglarious entry had been made, for

(2) Olds v. State, 97 Ala. 81.

it was not designed to commit the felony by such entry (3). And when the end of the bit used to bore a hole in the door to get at the lock must have been inside of the door, since some of the chips fell inside, this was held to be no entry (4.)

But if the instrument was inserted to commit the felony, as the insertion of a hook with which to pull out the goods inside, this would be a felonious entry. Therefore, if a person with murderous intent should knock enough of the mud from between the timbers of a log house so that he could see inside, this would be a breaking, and then if he should shoot through the hole to kill one inside the insertion of the ball would be a sufficient entry to make it burglary. An instance of constructive entry is furnished by the case where one bored a hole through the floor of a granary and caught the grain which ran out; this was a sufficient entry, admitting that the bit did not enter the granary, for no further entry was necessary to accomplish his purpose (5).

§ 112. **Dwelling-house.** The dwelling-house may be the rich man's mansion or the poor man's hovel or even his tent; and the dwelling house extends to include every building within the curtilege or yard; therefore one who opened the door of the barn adjoining the house at night, and went in and stole wool there stored, was held guilty of burglary, though it was about a hundred feet from the house to the barn (6).

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(3) Rex v. Rust, 1 Moody C. C. 183.
(4) Rex v. Hughes, 1 Leach C. C. 406.
(5) State v. Crawford, 8 N. Dak. 539.
(6) Pitcher v. People, 16 Mich. 142.

As the offense is punished as a violation of the habitation, not of the property, it would not be burglary to break into a house into which goods had been moved, but which had not yet been occupied as a residence; or which had been vacated. But if the family have merely gone away for the season, leaving the goods in the house and intending to return, or if the owner has two residences, one in town and another at his summer resort, and lives at one in the winter and in the other during the summer season, breaking into either in the period of absence would be burglary if the other elements of the crime were present.

§ 113. **Of another.** A servant who lodges in the house is guilty of burglary if he breaks into the chamber of his master or any inmate of the house at night with felonious intent; and the same would be true of a guest at a hotel who breaks into the room of another guest at night for like purpose; but in the indictment it should be alleged as the breaking of the dwelling house of the keeper of the hotel, not of his injured guest. If a servant open the outer door at night to let a burglar in, this is also burglary in him. If I break into the house of my tenant at night with burglarious intent, it would of course be no defense that I own the ultimate title to the house.

§ 114. **In the night-time.** For the purpose of burglary it is night-time when twilight has approached so far that it is impossible to recognize the countenance of another by the light of the sun; and it remains night-time till this condition is changed by the dawn. It is not important that the light of the moon or artificial light would enable

one to recognize another. While both the breaking and the entry must be in the night-time, yet if one with fraudulent intent unfastens and opens a window in the day-time so that he can get in at night, this is burglary. Evidence that the property was in place the night before and was gone in the morning, is enough to convict without proving that the property was taken in the dark hours, though the first witness to observe that the property was gone did not notice it till some time after daylight; for such things are not usually done in broad day-light in a public place, and this fact raises a presumption, in the absence of proof to the contrary.

§ 115. **The felonious intent.** Entry with any wicked or mischievous intent, not felonious, will not make burglary. Therefore where adultery is only a misdemeanor, breaking into the house of another with adulterous intent would not be burglary. The intent with which the act is done is sufficiently shown by what is done or attempted after entry is effected, or might be presumed from such suspicious circumstances as absence of any other apparent motive. It will be noticed that the essential intent is to commit a felony in the building broken into. It is believed that if the entry was merely to procure means to commit a felony elsewhere it would not be burglary. The felony usually designed is larceny, but any other felony intended would be sufficient.

Section 2. Arson.

§ 116. **Defined.** Arson is the malicious and voluntary burning of the dwelling-house of another by night or by day. It will be noticed that many of the elements of

burglary and arson are the same. Both are crimes against the habitation of another. Therefore all that was said as to what is a dwelling house for the purpose of burglary applies to arson and need not be repeated here. Likewise, what was said as to it being the house of another applies here. If I burn down my tenant's house to get the insurance or for any other cause it is arson; but if he burns it down, though with the most wicked and malicious purpose, it is not arson. The burning down of the house of the wife by the husband while they live together in it is not arson; and the same is true of her burning his house. It will be noticed that one element of burglary is not essential to arson—the time is immaterial.

§ 117. **What is a burning.** The crime is complete as soon as any part of the structure is consumed by fire. It is not necessary that there shall be any blaze. If fire be set to the building and it takes enough so that any part of the house is eaten out by the fire, as by a coal on the floor, that is enough. But if a fire be set on the floor of a house to burn it; and while the kindling is blazing the fire is discovered and extinguished, or if it goes out of its own account, arson has not been committed, though the house may be filled with smoke, the walls blackened, and the floor scorched.

§ 118. **The intent.** There need not be any intent in fact to burn the house with the burning of which the defendant is charged. The intent may be supplied by construction as in many other crimes. One who set fire to his own house to get the insurance was held liable for arson because the fire unintentionally spread and a burn-

ing shingle fell on the house of his neighbor long enough to set fire to a shingle on that roof (7). When a prisoner in a wooden jail set fire to the floor, with intent to control the flames with some water he had for washing and drinking until a hole would be made in the floor, through which he might escape, it was held arson, though he had at no time any design to burn the jail down (8).

(7) Commonwealth v. Tucker, 110 Mass. 403.

(8) Luke v. State, 49 Ala. 30.

CHAPTER IX.

CRIMES AGAINST PROPERTY.

§ 119. Outline. Of the crimes against property the following will be discussed: (1) larceny, at common law; (2) robbery, a compound offense against both person and property; (3) larceny from the person, a statutory crime; (4) larceny from the house, statutory; (5) receiving stolen goods, statutory; (6) embezzlement, statutory; (7) cheating, at common law; (8) forgery and uttering forged instruments, a form of common law cheating; (9) obtaining property by false tokens and pretenses, statutory; (10) malicious mischief.

Section 1. Larceny.

§ 120. Defined. Larceny at common law is the wrongful or fraudulent taking and carrying away of the personal property of another with the felonious intent to deprive him of it and convert it to the taker's own use. The points most debated in the courts have had to do with what consent by the owner to the possession of the property by the defendant would make the original acquisition by him lawful, and so prevent the subsequent conversion being larceny; for if he had it by the consent of the owner, it would seem clear that his taking was not wrongful.

§ 121. Wrongful in general. The original idea of larceny at the common law was that the first taking must be

unlawful; for if the defendant once had the possession of it lawfully, though he had criminal intent afterwards, it was no larceny. Accordingly one who hired furnished lodgings for three months and took bedding therefrom was held not liable criminally, because there was no trespass in the taking. This general doctrine remains to this day, but what constitutes a wrongful taking has received much modification in the course of five centuries, and it will be instructive to notice the principal classes of cases in which the question has arisen. The difficulty as to whether there has been a trespass sufficient to convict of larceny has arisen in cases in which, for his own purposes, the owner has given the accused custody as a servant, in making an exchange, or in some other capacity; or, where the accused received the property from another, and the doubt was whether the prosecutor yet had sufficient possession to make the wrongful conversion a trespass; or where the property had been delivered to the accused by mistake, or had been lost and was found by him. Let us examine these in the order named.

§ 122. **Wrongful taking by servant.** In the time of Henry VII and before, there was considerable debate as to whether a servant was liable criminally for taking property which came to his hands in the course of his service, and it was said that if I give my goods to my servant to sell or keep he cannot take them feloniously for they are in his possession. To put this doubt at rest it was provided by statute, 21 Henry VIII., c. 7, "that if any master or mistress deliver any goods to his servant to keep who withdraws himself and goes away with the

goods to the intent to steal them, or if he embezzle the goods of his master, or convert them to his own use, if the goods be worth forty shillings, it shall be felony." In construing this statute it was held that money received by the servant from another to be paid to the master was not received from the master within the meaning of the statute, though the master sent him for it. This decision was undoubtedly correct; but the statute was enacted to remove the doubt from the common law and as declaratory of it; yet from this decision it was soon taken that the conversion by a servant of money received from another for the master was no crime. Because of this conclusion it became necessary to provide by statute for such cases, and from this have arisen our modern statutes concerning embezzlement.

§ 123. **What is delivery to master: Deposit by servant for him.** Because of the rule established that the conversion by the servant of money received for his master before it had reached the master's possession was not larceny within the common law nor the statute of Henry VIII. above mentioned, it often became a question in cases of delivery to servants whether the master had yet obtained possession so that the subsequent conversion by his servant was larceny. It was finally settled that if the servant received the money or property for the master and deposited it in the cash box or other receptacle, the property was then in possession of the master, and any subsequent taking by the servant would be larceny; and in a case which occurred in England some years ago it was held that when the master sent his servant for a cart-

load of coal, and the coal was delivered by the dealer into the wagon, it was in the possession of the master within the rule above stated, so that the servant, in taking part of the coal out of the wagon on the way home and selling it, was taking it from the possession of the master and guilty of a sufficient trespass to make the taking larceny (1). In a late American case in which a saloon-keeper suspected his sales clerk of embezzling funds, and accordingly employed a detective to watch him, who made a purchase and paid marked money received from the master to the clerk, who deposited it in the till until the detective's back was turned and then took it out again, it was held that the mere fact that the clerk deposited the money in the till momentarily for his own purpose to conceal his embezzlement was not a delivery to the master; and therefore his conviction on a charge of embezzlement was sustained (2).

§ 124. **Trespass in making exchange.** Where one goes to a shop apparently to buy goods, and they are delivered to him to examine, this is not a consent to his possession of the goods without paying for them; and if thereupon he goes away with the goods it is a trespass sufficient to make the taking larceny. If one orders goods delivered, agreeing to pay cash on delivery, and when the goods are delivered, refuses either to pay or return the goods, such conversion is common law larceny unless the seller thereupon agrees that the buyer shall have credit for a time, however short, a day or even an hour. Likewise if upon

(1) Queen v. Reed, 6 Cox Crim. Cases 284.

(2) Commonwealth v. Ryan, 155 Mass. 523.

a purchase the purchaser pays for the goods by handing over a bill for change and the seller refuses either to return the bill or the change he is guilty of larceny of the bill; for it was delivered to him conditionally only, that is, that he would either return the bill or the change. It was even held that when a man met a girl in a bar-room, bought some brandy, and agreed to stay with her for the night, and later when she protested that they had not enough brandy gave her a twenty dollar bill to go back and buy some more, and she returned saying that she could not get the bill changed but in a minute more said she would try it in another place and left and did not return, it was held that the delivery to her was not absolute, and although the prosecutor did not expect to see the same twenty dollar bill again, yet he did expect to have either that returned or the change and the brandy; and therefore the conversion of the money by the girl was sufficient trespass to make it larceny (3).

Again, where the defendant agreed with a gas company to purchase gas at so much per thousand feet, and the company put in a meter to measure the gas taken, the act of the defendant in making a secret connection between his pipe and the company's main was a sufficient trespass to make the conversion of the gas larceny. The company had agreed and consented to deliver gas to him through the meter, but they had not consented that he should take the gas in any other way, and therefore his taking in another way was larceny (4).

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(3) Commonwealth v. Barry, 124 Mass. 325.

(4) Queen v. White, 6 Cox Crim. Cases 213.

The defendant claimed to be the agent for the Louisiana Lottery and desired that the prosecutor lend him some money to be used in the prosecutor's presence to illustrate to the prosecutor and the others present how the game was worked. The prosecutor handed over the money to be used in his presence for this purpose; and the defendant, having explained the trick, refused to return the money. Although the prosecutor had consented to the use of his money in his presence by the defendant, he had not agreed to part with the possession; and therefore the conversion was larceny (5).

§ 125. **Wrongful conversion of property delivered by mistake.** There has been much debate and difference of opinion as to whether one is guilty of larceny who converts to his own use property honestly received by him upon a delivery by the owner through mistake either as to what is being delivered, the person to whom the delivery is being made, or his right to receive the payment. On the one hand it is argued that the subsequent conversion is not larceny, because of the rule stated above, that where property is once received into the possession of the defendant rightfully no subsquently formed design by him to convert it to his own use and deprive the owner of it, can make the act larceny. Accordingly, where a bill of exchange was sent by mail and accidentally delivered to another person of the same name as the payee, who obtained the cash on it, and it did not appear that the prisoner had any *animus furandi* when he first received the

(5) People v. Johnson, 91 Cal. 265.

bill, the judges held that his conviction was erroneous (5a)

In a number of later cases in which one sum of money has been delivered in the belief that it was a smaller sum, for example, a twenty dollar gold piece as a silver dollar, the courts have been divided as to whether the consent to deliver the money was sufficient to prevent the subsequent conversion of it by the receiver after the discovery of the mistake, being larceny. On the ground that there never was any real consent to the possession by the defendant of the money converted it has been argued that the conversion was larceny. On the other side it has been argued that the criminal character of the taking must be determined by the facts existing at the time and cannot depend upon subsequent developments. A prisoner was convicted of larceny on proof that after dark he asked the prosecutor to loan him a shilling until the next day, on which the prosecutor took from his pocket and delivered to the prisoner a coin which both supposed to be a shilling, but which was in fact a sovereign, and that when the prisoner afterwards discovered what it was he immediately determined to and did appropriate it, had it changed, and later denied receiving it. Seven of the judges held that to constitute the crime of larceny at common law there must be a taking and carrying away of a chattel against the will of the owner, and that at the time of such taking there must exist such a felonious intent in the mind of the taker. If one or both of the above elements be absent, there cannot be a larceny at common law. The taking must be under such circumstances as would sustain

(5a) Rex v. Mucklow, 1 Moody C. C. 160.

an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law; and therefore in the present case the coin was not taken against the will of the owner, and if this be so, it is sufficient to show that there was no larceny at common law; and secondly, it being conceded that there was no felonious intent in the prisoner when he received the coin, this is also fatal to the act being larceny at common law. Six of the judges held that the prisoner was properly convicted. Their argument was, that, as the prosecutor gave and the prisoner received the coin under the impression that it was a shilling and not a sovereign, the prosecutor never consented to part with the possession of the sovereign, and consequently there was a taking by the prisoner without the prosecutor's consent. As the prisoner did not at the time of the delivery subject himself to the liabilities of the borrower of a sovereign, he was not entitled to the privileges attending the lawful possession of a borrowed sovereign. When he discovered that the coin was a sovereign he was bound to elect, as a finder would be, whether he would assume the responsibilities of a possessor; but at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use; and therefore was guilty of common law larceny (5b). In a later case it was held that a workman who was accidentally paid more than his weekly wages and discovered the fact upon opening his envelope, but thereupon immediately determined

(5b) Queen v. Ashwell, L. R. 16 Q. B. D. 190.

to appropriate the whole amount, was not guilty of larceny (6).

§ 126. Wrongful conversion by finder of lost property. It was early established that if one find goods lost by another and convert them to his own use it is not larceny, for the taking was lawful, though he might have denied the finding and secreted the property afterwards. But in later cases some nice distinctions were taken, which frequently make it a point of no little difficulty to decide whether the original taking was lawful; and one of the limitations thus placed on the old rule was that if at the time of the finding the finder knew who the owner of the lost article was, or from a mark upon it, the place where it was found, or other circumstances, he knew that the owner could be found, and upon picking it up immediately determined nevertheless to convert it to his own use and deprive the owner of it, that is larceny. One bought an old secretary at auction and found a purse and coins in a secret drawer and converted them to his own use. For this he was arrested, and later he brought an action for false imprisonment against the prosecutor and officer. In this latter action the court held that if he bought the secretary only and not the contents, the delivery of the secretary to him was not a delivery of the contents so as to give a lawful possession of the purse and money; the vendor had no intention to deliver it nor the vendee to receive it; both were ignorant of its existence; and when the plaintiff discovered the secret drawer and contents he was in the position of a finder of lost goods knowing

(6) Queen v. Flowers, L. R. 16 Q. B. D. 643.

how to find the owner, and if he then converted them to his own use it was common law larceny (7).

On appeal from the conviction of one who found a bank-note on the highway, not knowing who was the owner, and with nothing on it to indicate the fact, but who intended to and did appropriate it the moment he saw it, the court said among other things: "The rule of law on this subject seems to be that if a man find goods that have actually been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. It would probably be presumed that the taker would examine the chattel as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi.* The mere taking it up to look at it would not be a taking possession of the chattel. To apply these rules to the present case. The first taking did not amount to a larceny, because the note was really lost, and there was no mark on it or other circumstance to indicate then who was the owner, so that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved that he believed the owner could not be found, and therefore the original taking was not felonious; and if

(7) Merry v. Green, 7 M. & W. 623.

the prisoner had changed the note or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it *animo furandi,* and the point to be decided is whether there was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently and afterwards appropriated it without knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not" (8).

If the finder knew who the owner of the chattel was when he found it, and then picked it up to take it to the owner, it has been held that no subsequently formed intention to convert it to his own use could make the conversion larceny; for it may be that this thought first came to his mind when he was miles away from the chattel, and an honest possession cannot be turned into a crime by such a change of mind (9). An article which has merely been mislaid and forgotten, like a purse on a shop counter, is not lost, and one who converts it to his own use is guilty of larceny (10).

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(8) Queen v. Thurborn, 1 Denison C. C. 387.

(9) Queen v. Preston, 5 Cox Cr. Cases 390.

(10) Queen v. West, Dearsley Cr. Cases 402.

§ 127. Trespass by bailee in breaking packages. A strange doctrine has been established concerning bailees. It arose from a decision in England in the time of Edw. IV., on a question referred to the judges by the chancellor, which has ever since been known as the Carrier's case (11). It appears that one who had agreed to carry certain bales and other things to Southampton, took them to another place, opened the bales, and converted the contents to his own use. This would seem to be clearly within the rule that where one gets goods lawfully he cannot be guilty of larceny if he converts them to his own use; for one cannot be guilty of a trespass in taking what he has in his own possession, and without a trespass in the taking there could be no larceny. At first the judges seemed inclined to take this view of the case; but the chancellor seemed desirous of making the case turn on its moral character; and perhaps the king wanted the culprit punished. At all events a decision was finally reached, which many have thought to have been a compromise by the judges, to accede to the desire of the king and chancellor without overthrowing any more of the old law than need be; and the decision was that the carrier had possession of the bales, but that he did not have possession of the contents of the bales, which the sender might not want him to know of; that when he turned aside and opened the bales, he thereby determined the bailment and committed a trespass which made the conversion larceny. It may seem strange that a carrier should be guilty of a crime if he break the package and take a part only of the contents, whereas he would be guilty of

(11) Yearbook, 13 Edw. IV, 9, pl. 5.

a civil breach of trust only if he should appropriate the whole package without opening it. While this decision seems to be a plain contradiction of the general doctrine that one cannot take feloniously what he already has rightfully, it has not only been adhered to since, but even extended; and now it is held that if a bailee converts to his own use part of the goods entrusted to him he is guilty of larceny. If a miller is given a grist to grind and takes more of it than his toll he is guilty of larceny; if several parcels of goods are consigned to a carrier in one bill, and he takes one of the parcels to his own use, this is such a breaking of bulk as constitutes larceny, though the breaking of the package was only the imaginary package created by putting them in the same bill.

§ 128. **Fraudulent acquiring amounting to a trespass.** The wrong in the taking may be either a trespass, or a fraud inducing the owner to give the possession; in either case it is larceny. If there is an actual trespass, which is the ordinary case, or if there be a constructive trespass, as in the cases discussed in the foregoing paragraphs, it is common law larceny. It is also common law larceny though there was no trespass in the taking, provided the possession was acquired by a fraud. In this respect a vital distinction is taken between a fraud which induces the owner to part with possession only and one which induces him to part with his title also. If the possession only is obtained by the fraud it is larceny; but if the owner intended to part with both possession and title, the fraud which induced that intention and the consequent taking of possession

do not constitute larceny; and such acts are criminal only in consequence of statutes which declare the obtaining of goods by false tokens and pretenses to be criminal. A few cases will make this point clear. The defendant was a fakir on the street, took from his pocket a purse and three shillings, appeared to drop the shillings into the purse, and offered to sell the purse and contents for one shilling. The prosecutor offered to give a shilling for the purse and three shillings, gave the shilling, received the purse and contents, later found it contained three half-pence, and had the defendant arrested for larceny. The court said: "I cannot myself imagine a clearer illustration of the difference between the offense of false pretenses and that of larceny than is afforded by this case. It is perfectly clear that the prosecutor intended to part with the property in the coins, and that being so, the case is clearly not that of larceny" (12). In another case the defendant called at the prosecutor's house, said that the prosecutor had been arrested for assaulting a man with a chair and would be taken to jail immediately if he could not have $12, for which the defendant said he had been sent. The wife gave the defendant $2 and some jewels to pawn and take the money to her husband. On conviction of larceny for taking this property the defendant appealed, and the judgment was affirmed. The court said: "The accused obtained the custody of the chattels and money of the prosecutor from his wife by a fraudulent device and trick, and for a special purpose connected with the falsely represented necessi-

(12) Queen v. Solomons, 17 Cox Crim. Cases 93.

ties of the owner, with the felonious intent to appropriate the same to his own use. He did not pawn or pledge the goods as he had promised to do, but did appropriate the same to his own use, in pursuance of the felonious intent with which he received them. This constitutes the crime of larceny. The owner did not part with the property in the chattels or transfer the legal possession. The accused had merely the custody; the possession and ownership remained with the original proprietor'' (13).

§ 129. **What is obtaining with consent.** It has been held in some cases that consent obtained by fraud or mistake is no consent; for by the mistake or fraud the consent is avoided. But it is believed that this is not so; for such a doctrine would make a man guilty of rape who obtained the consent of a common prostitute by giving her counterfeit money; and many other manifest absurdities would result from a general recognition of such a doctrine. And yet it is clear that that consent is no defense to a charge of larceny unless it was genuine, and the thing done was the thing consented to. One who stole a box of matches from the counter of a grocery store was held guilty of larceny, though the matches were put there by the owner to be used by his customers to light their pipes. It was said that he put them there to be taken, consented that they be taken, and intended that anyone who wished them should take them; and therefore the defendant committed no larceny when he took them. But it is clear that the owner did not consent nor intend that anyone should take the whole box, and so the defendant took them with-

(13) Smith v. People, 53 New York 111.

out the consent and against the will of the owner, for which he was properly convicted of larceny (14). In another case a cotton buyer was properly convicted of stealing cotton on proof that, following the custom of cotton buyers, he put a barbed spear into the bales to test the quality of the center of the bale by pulling out a part of it, but used an instrument intended to bring out much more than was necessary to ascertain the quality, and with the intention to appropriate the whole amount taken to his own use. The farmer consented that he should sample the cotton, but that was not a consent that he should take more than was necessary and customary to learn the nature of the inside of the bale (15). In the case mentioned some time ago, a village marshal, who, suspecting thieves, disguised himself, played drunk, fell down in an alley, and watched for the thieves to come and take money he had put in his pockets for them, had not consented that they should take the money, and although he lay very still until they had taken the money and was watching them all the time, it was properly held that they were taking without his consent and were guilty of larceny (16).

§ 130. **What carrying away is sufficient.** To make the crime of larceny there must be a taking and carrying away of the goods by the thief. But the reader must not assume that it is necessary that the thief get to any great distance with the goods. It is enough to make the crime

(14) Mitchum v. State, 45 Ala. 29.
(15) State v. McRae, 111 N. Car. 173.
(16) People v. Hanselman, 76 Cal. 460.

complete that he had reduced the goods to his entire and exclusive dominion and had started away with them. Any moving of the entire parcel is a sufficient carrying away. A thief who removes a bag from the front to the tail of a coach and drops it because he is caught, or who just lifts it up and then drops it to avoid detection, is guilty of the complete crime of larceny. A man who went to a store and asked for something in the window, and, while the proprietor was going for it, opened the till and grasped the bills in it, was held guilty of larceny, though he dropped them in a crumpled condition on being discovered (17). A man who shot a pig running in the woods and fraudulently procured the consent of the owner afterwards to remove it to make soap of it, by saying that he found it dead, was held guilty of larceny in taking it (18). If he had not removed it after he shot it, his crime, whatever else it might have been, would not have been larceny. The carrying away may be by an innocent agent, as in the case of the thief who transferred the check from his trunk to another and the other check to his at a railway station, causing the railway company to deliver the other man's trunk to him and send it to wrong destination. He was clearly guilty of larceny (19).

§ 131. **What goods are another's.** It is clear that a man cannot be guilty of larceny in taking his own property. And yet if I lend you my umbrella and later take it secretly to charge you with its value, you clearly have

(17) Eckels v. State, 20 Ohio St. 508.
(18) Frazier v. State, 85 Ala. 17.
(19) Commonwealth v. Barry, 125 Mass. 390.

a sufficient interest in it to sustain a charge of larceny, and my intent is feloniously to deprive you of that property, which makes me guilty of larceny. Even a thief has a sufficient property in the goods stolen to make it larceny in anyone to steal from him the same goods. But as husband and wife are one, it has been held that she could not be convicted of larceny in taking his goods; wherefore an adulterer who took goods given him by the wife of another, with whom he was eloping in adultery, was held not guilty of receiving stolen goods (20). One who had deposited his bicycle as security for his board was held guilty of larceny in fraudulently taking it (21).

§ 132. **What is a sufficient taking.** There is no complete larceny until the thief has succeeded in reducing the goods to his exclusive and complete dominion. A pickpocket was held not guilty, because the string of the purse he stole stuck to the keys still in the prosecutor's pocket (22). One who knocked money out of the hand of another to steal it was held not guilty because he could not find it on the ground where it fell and never had complete dominion over it (23). One who tried to steal a hog by tolling it along with corn dropped on the ground to lead it away, was held not guilty of larceny though he had led it along for several rods, for when he tried to seize it the hog ran away (24). One who sought to steal an overcoat standing in front of a clothing store on a wire dummy,

(20) Queen v. Kenny, 13 Cox Cr. Cases 397.
(21) Henry v. State, 110 Ga. 750.
(22) Wilkinson's Case, 1 Hale P. C. 508.
(23) Thompson v. State, 90 Ala. 535.
(24) Edmonds v. State, 70 Ala. 8.

seized it and ran with it, but stopped with a sharp turn when he reached the length of the chain by which it was fastened to the building; and it was held that he was not guilty of larceny, because he never had complete possession of the property designed to be stolen (25).

§ 133. **Property taken must be personal estate.** In the absence of statute nothing can be the subject of larceny which is in the nature of real property. At an early day it was held that one could not be convicted of larceny for taking a box of title deeds; for although the box was personal property and the deeds were paper or parchment, yet their character as evidence of land titles was so much superior to their character as box and paper that the law could see them only in the character of incidents to the land. For the same reason the keys of the house, the fruit on the tree, the corn growing in the field, and the like, could not be the subjects of larceny, and it was merely a civil trespass and civil private wrong to take them. The trespasser who went to another man's woods and cut and took away his trees, or dug up and carried away his coal or other minerals, was not guilty of larceny; for the things he took were not chattels and goods, but real property, which could not be stolen. But if the trespasser went and cut the logs, dug the coals, cut the hay, or the like, and left them, he thereby made them personal property of the owner of the land; and if he then returned at a later time and carried them away, such asportation was carrying away the goods of another, and the taker was

(25) People v Meyer, 75 Cal. 383.

guilty of larceny in such taking. This rule of the common law has induced the enactment of a multitude of statutes in the various states, making the taking of fruit from an orchard or vineyard, grain or vegetables growing or in the ground, and many other trespasses, a statutory form of larceny.

§ 134. **In what things one may have property so that taking is larceny.** What is held in common by all, no one is guilty of larceny in taking, for example, air and sunshine, under ordinary circumstances. The same is true of wild fowls, fish and game. To be the subjects of larceny these must be subjugated. If I tame a deer my property in it continues only while I retain my dominion. If it returns to the forest another may take it. But if one takes my deer from my enclosed park, my fish from my net, or the like, intending to convert them to his own use, this is larceny. Yet there are things by their nature so base that the common law, out of favor to life, would not admit of their being the subjects of larceny, such as cats and dogs, though tamed and domesticated; for, as Lord Coke very forcibly put it, the law did not deem it fit that any man should die for a dog. Yet even in those days, one might die for stealing the trained hawk with which the lords of those days were fond of hunting. These peculiar decisions are hard to reconcile, and were no doubt induced by the severity of the punishment which was then inflicted on the thief. In later cases it has been said that one may be guilty of larceny in taking anything of value for man's food or clothing; and even the stealing of bees, which are of no value for either purpose, has been held larceny, be-

cause they produce what is suitable for food. It has also been held that it is larceny to steal a song bird and the cage in which it was confined on the porch of the owner. The bird was suitable neither for food nor clothing, and yet it ministered to the comfort of the owner, and could be sold for a good price; and the severity of the old law being now abated, there was no reason why the stealing of such things should not be punished as larceny (26). It seems rather contradictory also to say that one could be punished criminally for the larceny of the pelt of a dead dog, but could not be punished for stealing a live one; and there are a number of late decisions in which it has been held that one may be punished criminally for stealing dogs; and it has been said that, considering the service that these animals are continually rendering for the life, comfort, and safety of their master and his family, and the fact that he now pays taxes for his dog as he does for his other property, the taking of a dog with intent to deprive the owner of it is larceny (27).

§ 135. **The intent at the time.** The mere wrongful taking of the chattel of another is not sufficient to make larceny unless there is the accompanying intent which the law regards criminal. As we have noticed several times before, this criminal intent must exist at the time of the taking, and no subsequent change of intent can make the act criminal which was not so when it was done. If I take another's goods intending to deprive him of them it is not larceny provided I thought they were my

(26) Haywood v. State, 41 Ark. 479.

(27) Mullary v. People, 86 N. Y. 365.

goods, and this is so though my error was one of law and not of fact. A woman who had loaned a man money was held not guilty of larceny in taking the money of his son who had appropriated his estate, if she thought she had a right to make collections in that way (28).

But one who took the property that he knew belonged to a contractor, was held guilty of larceny in taking that property to compel the contractor to perform the contract according to his construction of it, for he was not mistaken as to his right to that property (29).

There are a great many cases illustrating the proposition, already frequently stated, that the criminal intent must exist at the time of the taking, and that no subsequently formed criminal intent will give such character to the taking as to make it larceny. One who took prosecutor's goods from his burning house to save them from the flames was held not guilty of larceny by reason of the fact that she afterwards concealed them in her own house, denied possession of them, and designed to appropriate them to her own use, if she had no such intention at the time of taking them (30). But one who had permission to pasture his sheep in a lot over night on his way to market was held guilty of larceny of a lamb not of his flock, which in the morning went with the sheep without his knowledge, though it was first seen by him when his flock was in the pen at the market, for after he saw it he sold it with his flock. In this case the original taking was

(28) Commonwealth v. Stebbins, 8 Gray 492.
(29) Currier v. State, 157 Ind. 114.
(30) Leigh's Case, 2 East P. C. 694.

not lawful but a trespass, and the subsequent conversion related back to this wrong and made the crime complete (31).

The rule with regard to bailments, that a hiring for one purpose with an intention at the time to use for another purpose, as the hiring of a horse to go to one place and having an intention all the time to go farther or in a different direction, is a wrong which avoids the bailment and makes the bailee liable as a trespasser if he afterwards goes otherwise than he had agreed, has been held applicable to larceny; and accordingly it has been held that one who hires a horse to go to one place intending all the time to go to another is guilty of larceny if he subsequently sells the horse; for the wrong which accompanied the hiring unites with the wrong afterwards designed and executed to make the taking larceny (32). There may be considerable doubt as to whether the courts generally would follow this decision. There would be no larceny in the subsequent conversion and sale if the intention at the time of the hiring was honest and according to the agreement made with the owner. The decisions concerning breaking of bulk by carriers (33) would seem contrary to the principle now under discussion, but they are reconciled on the ground that the breaking of the package is a new taking and original trespass.

§ 136. What is intent to deprive owner of his property. To the crime of larceny it is not necessary that the defend-

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(31) Queen v. Riley, Dearsley C. C. 149.

(32) State v. Coombs, 55 Me. 477.

(33) § 127, above.

ant designed that the owner should get no benefit from his property. It is enough that he intended to convert it to his own use, and it is no defense that that use was beneficial to the owner also, nor that he was the person principally benefited. A servant who stole oats from his master's granary with design to feed them to the horses which the servant was accustomed to drive, designed to deprive his master of the oats, and it was not material that the master was indirectly benefited by having his horses fed with them. The servant knew that he was taking the master's property without his consent, depriving him of it permanently, and converting it is the use of the servant, in getting the pleasure of feeding his favorite team; and consequently he was convicted of larceny for taking the oats (34). If A. wrongfully takes from B., without his consent, a bushel of wheat, and returns and sells it to B., no one will contend that the fact that the wheat was thus returned, and intended to be so returned, when taken, relieves the act of taking of its felonious character. In such case the offense of larceny would be as complete as if the wheat had been sold to a stranger. On an indictment for stealing tallow it appeared that prosecutor was a tallow-chandler and that about the noon hour the defendant, who was in his employ put some of the prosecutor's tallow on the scales and told him there was some tallow on the scales for him which came from a butcher he named, the design of the defendant being to obtain pay for the tallow and divide the money with the butcher's driver, who came with him for the money.

(34) Queen v. Privett, 2 Cox C. C. 40.

It was contended for the defendant that there was no design to deprive the chandler of his tallow. One of the judges said: "If a man takes my bank note from me and then brings it to me to change, does he not commit larceny?" Another judge asked: "How could he deprive the owner of it more effectually than by selling it? To whom he sells it cannot matter. The case put of the bank note would be an ingenious larceny, but no case can be more extreme than this." Finally it was concluded that the conviction was right; for one who takes property from another intends wholly to deprive him of it, if he intends that he shall get it back under a contract by which he pays the full value for it (35).

It is not necessary to the crime of larceny that the defendant shall have intended to deprive the owner wholly of his property. One who found a horse trespassing on his premises concealed it with intent to hold it till the owner would offer a reward for it and then return it and claim the reward. This was held to be larceny. The guilt cannot depend on the intent to exact the full value or a less amount. To the extent that the defendant expects to be paid he designs to deprive the owner of his property. The cases are clear and numerous on this point (36). But when a skin dresser in a tannery, who was to be paid by the piece for the work done by him, the foreman coming about each day and counting the hides on his peg and crediting him for the work done, hung on his peg some skins that had been dressed by others and paid for,

(35) Queen v. Hall, 3 Cox Cr. Cases 245.

(36) Commonwealth v. Mason, 105 Mass. 163.

the court held that his act amounted to no more than a piece of dishonest bookkeeping, the same as if he had been required to put down a tally mark as he finished each skin, and had put down more marks than he dressed skins (37). On the contrary, it was held that a cotton picker who broke into the warehouse, and stole cotton, and carried it to the field, to be paid for picking it, was guilty of statutory burglary as much as one who takes another's property and holds it for a reward (38).

§ 137. **Intent to deprive the owner permanently.** It is often said that it is essential to larceny that the defendant have the purpose to deprive the owner of his property permanently; and to this effect are such cases as the one where a man took a girl's clothes to a hay-mow where they had been together, with the intent to induce her to come to get them. He was not guilty of larceny because his design was only to deprive the owner of her property temporarily and for a special purpose (39). An indentured servant who mounted a horse he found hitched by the road, and rode it away to make good his escape, was held not guilty of larceny, because he did not design to deprive the owner of it permanently; and the same was held of one who took the gun from the guard at a work-house, to prevent its use in hindering his escape, though he afterwards sold or gave it away (40). But if the defendant had the purpose to convert the property to a use of his

(37) Queen v. Holloway, 3 Cox Cr. Cases 241.
(38) Fort v. State, 82 Ala. 50.
(39) Rex v. Dickinson, 1 Rus. & R. 420.
(40) Mahoney v. State, 33 Tex. Cr. Rep. 388.

own which might result in depriving the owner of it permanently, it is not a defense that he had an intention at some uncertain time in the future to make good to the owner the return of his property or hoped that he would get it again. One being convicted of the larceny of a box of plate worth £600, which the prosecutrix had left him for safe keeping, a question was reserved as to whether the conviction could be sustained in view of the finding that the prisoner intended when he took the plate to redeem it when he could get the money and then restore it to the owner. The judges agreed that this was no excuse. The views of the court can be gathered from the following opinion by Crowder, J. "It seems to me, also, that upon the facts of this case no other rational conclusion could be arrived at, except that the prisoner stole the plate. He broke open the box, and took out the plate and stole it, but the jury recommended him to mercy because they thought that he had an intention of ultimately restoring it. Probably it very often happens that when stolen goods are pawned, there is an intention to get them back again, if the person pawning them should ever be able to do so, and in that case to return them; but such an intention affords no ground for setting aside a verdict of guilty, when the offense of larceny is satisfactorily proved by the evidence" (41).

§ 138. **What is conversion to taker's own use.** It has often been argued that the essence of the crime of larceny is the design of the accused to profit by taking the prop-

(41) Queen v. Trebilcock, 7 Cox C. C. 408.

erty of another, and that if there is no design on his part to profit by the act it is not larceny. There is some support for this contention in the decided cases; but whether the doctrine is admitted or not, it is clear that the profit intended by the wrong-doer in cases of larceny is very different from what is ordinarily understood. In many cases it is flatly denied that intention to profit by the act is essential to the crime of larceny. A few illustrations will make the state of the law clear to the reader. On an indictment for stealing two letters containing money and stamps, it appeared that the defendant was a clerk in the postal service, had failed to deliver the letters on time, and had put them into the water-closet to avoid the discovery of his fault and the resulting penalty. This was held to be a sufficient profit to him to make the taking larceny (42). In another case a woman who had applied for work learned that her former employer had written an unfavorable report concerning her to the woman to whom she had applied for work. To avoid the delivery of this unfavorable report, she went to the post-office, called for the letter, received it, and destroyed it. In this case all but one of the judges held that, even admitting that profit to the accused was an essential ingredient of the offense, here was sufficient profit to sustain the conviction (43). On a prosecution for larceny the defendant admitted that he took the horses, saddle and spurs, with which he was charged; but said that he had no design to profit thereby, and that his only object was to harass and annoy the

(42) Queen v. Wynn, 3 Cox Cr. Cases 271.

(43) Queen v. Jones, 1 Denison Cr. Cases 188.

owner, and put him to as much expense and trouble as possible to recover his property; wherefore he had driven the horses some five miles away and turned them loose on the plains. The court reviewed the decisions and concluded that profit to the thief is not essential to the crime of larceny (44). In another case one who killed a calf and threw it into a well to prevent the discovery of its identity as the one he had stolen from another and sold, was held guilty of larceny in taking it from the man to whom he had sold it (45).

Section 2. Robbery.

§ 139. Defined. Robbery, by the common law, is a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear. It is held that if property is taken by either of these means, against the will of the party, such taking will be robbery. At common law, therefore, there was but one offense, and fear was held to be constructive violence. Whilst robbery is a species of larceny, and whilst felonious taking is an element common to both, yet the two offenses are widely different. The criterion which distinguishes robbery from larceny is the violence which precedes the taking. There can be no robbery without violence.

§ 140. The felonious taking. As robbery is an aggravated species of larceny, the same taking, intent, etc., which are essential to larceny are essential to robbery.

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(44) State v. Slingerland, 19 Nev. 135.

(45) Stegall v. State, 32 Texas Cr. Rep. 100.

A taking by force under a claim of right is not robbery though the claim prove unfounded. The thing taken must be property which could be the subject of larceny. The same taking is essential to make out the offense, and the same carrying away; and the crime completed by doing these things is not excused by any subsequent abandonment. A robber handed back the purse to the owner saying that he might keep it if he would give the robber the contents. Though the robber was taken before the owner could hand over the contents, the crime was held to be complete (46). One who forcibly tore a ring from a woman's ear, and thus reduced it to his exclusive possession, was convicted of robbery though the ring caught in her hair an instant later and was lost by the felon (47). But one who made a man drop what he was carrying, and was arrested before he could pick it up was held not guilty of robbery, because he had not yet acquired possession (48).

§ 141. **The force and fear.** The force must be either an actual struggle for the possession of the property or such violence as does a personal injury to the victim. The case of the ear-ring above mentioned was robbery though the ring was seized by the robber without the knowledge of the victim and there was no struggle for the possession, for the violence was manifested in an injury to the person robbed, by tearing a slit in her ear. Where one designed to steal another's sword by stealth, but was caught in

(46) Rex v. Peat, 1 Leach No. 112.
(47) Rex v. Lapier, 2 East P. C. 557.
(48) Farrel's Case, 2 East P. C. 557.

the act, the owner grabbed it, and they struggled for it, this was held as robbery, for the taking was by force (49). But when the thief took a purse by stealth, was discovered just as he was getting away, and was seized, he was held not guilty of robbery though he escaped with the purse after a struggle; for the struggle was not for the purse but to secure the prisoner, and he could not be sure of escaping by dropping the purse (50). Likewise, the fear, in robbery by putting in fear, must accompany the taking not succeed it. Harman, being on horseback, desired Halfpenny to open a gap for him, and while he was so doing, Harman took the opportunity, unperceived, to pick his pocket of his purse. Halfpenny, turning round and seeing the purse in Harman's hand, demanded it of him, and Harman answered him, "Thou villain, if thou speakest but a word of thy purse, I will pluck thy house over thy ears and drive thee out of the country, as I did John Somers." And so he went away with his purse. On an indictment for robbery, the prisoner was held guilty of simple larceny only; the property being obtained by stealth, and not by violence or putting in fear (51).

§ 142. **Robbery from the presence.** The essence of robbery as an aggravated form of larceny consists in the violence done to the person. But it is not essential to this violence that the property should be taken from the person. This is illustrated by an old case. While the prosecutor was riding on horseback in the highway by the

(49) Davies's Case, 2 East P. C. 709.
(50) State v. John, 5 Jones (50 N. C.) 163.
(51) Harmon's Case, 2 East P. C. 736.

prisoners, one of them asked him to change a half-crown; and when he took some coins from his pocket to make the change, one of them gently tapped him on the arm, which knocked the coins to the ground. He said he would not lose his money so, and was attempting to dismount to pick it up when they threatened to blow his brains out if he did; he was thus restrained by fear, and they picked up the coins and rode away. This was held clearly robbery (52). A later case will show what is within the presence. The prosecutor was in a smoke-house 45 feet back of his house in the evening, getting out rations for his men, when one of the defendants came to the door and said the first man who put his head out of the smoke-house would have it shot off. By looking through the cracks the prosecutor saw a man standing at the door with a gun in his hand. He made no attempt to come out till some time later; and then he could find no one about. When he went into the house he found that another of the defendants had been in and taken from under the bed a box containing money. This was held to be robbery from the presence by putting in fear (53).

Section 3. Larceny from the Person.

§ **143. In general.** Robbery is a common law aggravated larceny; but there have been statutes passed making a distinct offense of another aggravated larceny, commonly known as pocket-picking. Without creating any new offense. these statutes have provided a severer pen-

(52) Rex v. Francis, 2 Strange 1015.

(53) Clements v. State, 84 Ga. 660.

alty for thieves convicted of secret larceny from the person than is inflicted in cases of simple larceny. These statutes seem to have been induced by the prevalence of the practice, the ease with which the offense could be committed, the difficulty in adequately providing against it, the boldness of the act, the violation of the person accompanying it, and the danger of actual violence in case of discovery. If one is so bold as to go to sleep in a public place, as a car or park, and one takes anything from the coat on which he rests his head, or even plucks the buckles from his shoes, these offenses would seem not to be within these statutes. But the fact that the thief is caught in the act, so that there is no secrecy, does not prevent the statute applying.

Section 4. Larceny from the House.

§ 144. In general. Another form of aggravated larceny which has received the special attention of the legislatures consists of thefts from dwellings and storehouses under circumstances which do not amount to burglary. To bring a case within these statutes it is held that the building must be the house of another than the thief, for which reason the wife of the man of the house would not be guilty under the statutes in taking the property of another which was under the protection of the house, and the taking must have been of property under the protection of the building and not of such as was under the immediate eye of the owner. Shop-lifting is not larceny from the house, for it is the taking of property from under the eye and personal protection of the owner or his ser-

vants. What is outside of the house, such as trunks on a truck at a railway station, though under the eaves of the building, so as to be protected from the weather, is not so far under the protection of the building that taking it is larceny from the building.

Section 5. Embezzlement.

§ 145. **In general.** Embezzlement is not a common law offense. The statutes on the subject, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions, which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust toward their employers or principals, and thereby became possessed of their property. In such cases the moral guilt was the same as if the offender had been guilty of an actual felonious taking; but in many cases he could not be convicted of larceny, because the property which had been fraudulently converted was lawfully in his possession by virtue of his employment, and there was not that technical taking or asportation which is essential to the proof of the crime of larceny (54). The statutes relating to embezzlement were intended to embrace this class of offenses; and it may be said generally that they do not apply to cases where the element of a breach of trust or confidence in the fraudu-

(54) See § 122 of this article.

lent conversion of money or chattels is not shown to exist. These statutes, like all penal enactments, are strictly construed. It may be put down as a general rule that if the goods were in actual or constructive possession of the owner at the time of the taking and conversion the crime is larceny and not embezzlement. If they were in the lawful possession of the accused at the time of the wrongful conversion, the act is embezzlement, not larceny.

Where the prisoner was the clerk of A., and received money from the hands of another clerk of A. to pay for an advertisement, and kept part of the money, falsely representing that the advertisement had cost more than it had; it was held that this was larceny and not embezzlement, because A. had had custody of the money by the hands of the other clerk (55). The distinction is between custody and possession. A servant who receives from his master goods or money to use for a specific purpose has the custody of them, but the possession remains in the master. The statutes are designed to cover a class of cases in which there exists the element of a trust or confidence reposed in a person by reason of the delivery of property to him, which he voluntarily takes for safe keeping, and which trust or confidence he has violated by the wrongful conversion of the property. Beyond this the statute was not intended to go. Where money paid or property delivered through mistake has been misappropriated or converted by the party receiving it, there is no breach of a trust or violation of a confidence intentionally

(55) Rex v. Murray, 1 Mood. 276.

reposed by one party and voluntarily assumed in the other. The moral turpitude is therefore not so great as in those cases usually comprehended within the offense of embezzlement.

Section 6. Receiving Stolen Goods.

§ 146. In general. In 1691 it was enacted by statute, 3 Wm. & M., c. 9, § 4, that, "forasmuch as thieves and robbers are much encouraged to commit such offenses because a great number of persons make it their trade and business to deal in the buying of stolen goods; be it therefore enacted by the authority aforesaid, that if any person or persons shall buy or receive any goods or chattel that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, he or they shall be taken and deemed an accessory or accessories to such felony after the fact, and shall incur the same punishment as an accessory or accessories to the felony after the felony committed." By subsequent statutes the receiver might be convicted either as accessory to the theft or as an independent felon. These statutes are the foundation of our legislation on the subject, and the statutes resemble each other in general, though differing in minor details. Within these statutes one is guilty of receiving stolen goods who takes them without profit or bargain with the thief, for the mere purpose of concealing them and the theft; and the act may be done in person or through a servant. All persons implicated in the concealment and conversion of the goods after the theft and having joint or several control of them, on which they can procure de-

livery to the owner on adjustment of the blackmail to be charged for the return of the goods, or uniting in the disposition of them, are guilty of the statutory crime of receiving stolen goods. But one who receives the thief with the design of treating with him for the goods he has stolen has been held not to be guilty of receiving the goods before he has obtained delivery from the thief. If the goods were embezzled, not stolen, one receiving them is not guilty of receiving stolen goods. If the goods have been reduced to the possession of the owner since the theft, and he has them delivered to the receiver, with the design to convict him, the goods have ceased to be stolen goods before the receiver gets them, and he cannot be convicted. While knowledge of the theft at the time of receiving the goods is an essential element of the crime, it is not necessary that the receiver have direct and positive knowledge. It is sufficient that he has good reason to believe and does believe that they have been stolen; and proof of knowledge sufficient to convict would be made out by showing that the receiver paid only a fraction of the real value of the goods, denied having received them, lied about his disposition of them, knew that the seller was an ex-convict, and the like. If the circumstances surrounding the reception of the goods were such that a man of the defendant's age and intelligence would have suspected that the goods were stolen, and he received them without inquiry to satisfy himself that the seller had lawful title, the jury would be warranted in finding the guilty knowledge of the defendant essential to convict him.

Section 7. Cheating at the Common Law.

§ 147. **In general.** The crime of common law cheating is practically superseded by statutes against obtaining goods by false pretenses. A fraud accomplished by the use of a false token or symbol against which common prudence cannot guard, such as false weights and measures, is cheating at common law, and an offense independent of statute. It was thought that the general public did not need protection against frauds practiced by means of mere lying, and the unsupported representations of the defendant; and that therefore it was well enough to leave persons thus defrauded to procure their relief by private civil action for damages. The fallacy of this doctrine was soon demonstrated; for designing, irresponsible persons immediately took from it permission to prey with impunity on the weaker and more credulous part of the public; and the proportion of those who could be defrauded by a fair story was found to be much larger than had been supposed; which led to the statutes concerning obtaining money or goods by false and fraudulent pretenses.

Section 8. Forgery.

§ 148. **Defined.** Forgery is a species of common law cheat which early took place as a crime under a separate name, and consists in falsely making or materially altering, with fraudulent intent, any writing which if genuine might apparently be of some legal efficacy or the foundation of a legal right or liability. Both the completed fraud and the unsuccessful attempt were criminal.

§ 149. **The writing altered.** It has been held that if the writing was void on its face, such as a will signed by only one witness, or a bill of exchange without the required revenue stamp on it, the making of such a manifestly void instrument is not forgery. It is not every writing the false making of which would be forgery, though such a writing might be used to accomplish a fraud. If one should make an imitation of a soap wrapper and sell a spurious article in that wrapper as genuine, that would not be forgery, for no one supposes that the wrapper has any validity to create a right or liability. Even the signing of a man's name is not necessarily forgery, though done to commit a fraud. If one should put an article on the market as Fletcher's Castoria and forge the signature of Fletcher on the wrapper, as it appears on the genuine article commonly sold, that would not be a forgery, but an infringement of the maker's registered label and a species of unfair trade. But it is not necessary to the crime that the instrument forged shall be in writing, print will do as well. One who makes an imitation of a railway ticket for the purpose of passing it as genuine is guilty of forgery, though the whole be in print; for the ticket has a legal efficacy, as the foundation of a right to the ride mentioned in the ticket.

§ 150. **The false making or altering.** The gist of the crime of forgery is not that the writing speaks falsely, states what is not true, for that would be merely a lie in writing, which is no worse than a lie spoken. To be forgery it is necessary that the writing purports to be what it is not, to be the writing of one man when it is the writ-

ing of another. It may be that the man whose writing it purports to be is dead or never existed; that is not material. One signing an assumed name to an obligation to acquire goods or money and avoid discovery of his identity and liability for them is guilty of forgery. One who signs his own name to procure money due on a note or check to another of the same name is purporting to sign the name of the other man and perhaps to be the other man, and it is no defense that he happens to have the same name. But one who claims authority to sign the name of another man, and so signs the other name by himself as agent is merely making a false statement of fact in writing, that he has authority to sign for the other man. That is not forgery. A book-keeper who makes a false entry in the books of his employer is not guilty of forgery merely by reason of the falsity of the entry. The writing is what it purports to be, an entry by the book-keeper; it is merely a false entry. But if one not authorized to do so makes an entry in the books to defraud, that is forgery; for the writing is not what it purports to be. The item entered may be a true and fair statement of an actual transaction and be a forgery nevertheless. If I make an entry in your books which purports to be your entry and may be used as evidence against you, as an admission against interest for example, that is a forgery if it is made to defraud.

§ 151. **What is uttering a forgery.** Uttering a forgery is a common law misdemeanor distinct from forgery. One may be guilty of uttering without forging or of forging without uttering. To constitute an uttering it is not neces-

sary that the forged instrument should have been actually accepted and received as genuine by the party sought to be defrauded. A receipt may be uttered by merely exhibiting it to one of whom the utterer claims credit for it, though he refuses to part with the possession of it.

SECTION 9. OBTAINING BY FALSE TOKENS AND PRETENSES.

§ 152. **What is a false token.** Because the common law did not afford means to punish frauds other than cheating by false weights and measures, it was provided by statute, 33 Hen. VIII, c. 1, entitled "a bill against them that counterfeit letters or privy tokens to receive money or goods in other men's names," that they should be punished by imprisonment and corporal pains. Under this statute it was held that one was not guilty who obtained money by pretending that another sent him for it, or that the genuine note of another by him then offered was collectable, or by giving a check on a banker with whom he had no deposit, or the like, but that there must be something false and purporting to come from one not the bearer, and having in itself some private mark or sign, calculated to induce the belief that it is real, and thus to cause a person to whom it is delivered to part with his money or goods to the bearer or person delivering it.

§ 153. **The statutes on obtaining by false pretenses.** Because of the narrowness and insufficiency of the statute above mentioned, it was provided by another statute, 30 Geo. II, c. 24, on which all the American statutes are modeled, that "all persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any

person or persons, money, goods, wares, or merchandise, with intent to cheat or defraud any person or persons of the same," shall be fined, imprisoned, whipped, put in the pillory, or transported, as the court shall think fit. The punishment in this country is fine and imprisonment.

§ 154. **Pretense must procure and be false.** If the statement made to procure the money or goods and intended to deceive turns out to be true, it is no crime though it was made fraudulently and accomplished the purpose intended. On the other hand, though the statement was false there is no crime unless the pretense did deceive and was the means of procuring the goods. If the goods were delivered before the false statement was made, fraudulent pretenses to obtain extension of credit, prevent interference with the use of the goods, or the like, do not come within the statutes. If the prosecutor knew at the time the statement was made that it was false, but delivered the goods to convict the accused, or for any other reason, the goods were not obtained by the false pretense, and so no crime. If the statement was false and fraudulent, intended to deceive and did deceive, it will not sustain a conviction unless it had a proximate influence on the prosecutor in parting with the goods; for example, if one should pretend that he had traveled in foreign countries, could speak seven languages, and was once a very rich man, these statements, though false and intended to deceive, could scarcely have a direct influence in obtaining credit. If the statement is equally within the knowledge of both parties, as that the prosecutor had borrowed the money of the accused, it has been held that

there is no ground for conviction, because the statutes were designed to protect men from frauds where they do not know the facts. A clear instance of this kind was the reversal of a conviction of a man for presenting his check at a bank where he knew he had no funds. If presenting the check for payment could be considered a false pretense that he had funds there, which may well be debated, for honest men often over-draw their accounts, it was a fact which the banker should know as well as he (56). It has been held that there can be no conviction unless the pretense is one likely to deceive one of ordinary understanding. But this doctrine has been generally and correctly repudiated; for the gullibility of the public is proverbial, and the very purpose of these statutes is to guard against such frauds as might be practiced upon the simpler members of society with impunity at the common law. Therefore one who has a package which he says is $2,000 of good money, which he is offering for sale for $200, is guilty of obtaining money by false pretenses if it turns out that the package he delivers has one good bill on the outside and the rest waste paper.

§ 155. **What is a pretense.** A criminal false pretense must be on a matter of fact, not of promise or opinion. If I borrow of you money on my promise to repay it at a certain time I am not liable to conviction of a crime though a jury might be convinced that I did not intend to pay when I borrowed. If I obtain money on a promise to use it so and so, my intention at the time, and subse-

(56) Commonwealth v. Drew, 19 Pick. 179.

quently executed, to use it otherwise, does not make the act criminal under these statutes. One does not violate these statutes who puffs the goods he is selling, so long as what he says is mere general commendation and opinion. A man who borrowed money on an outlying city lot, and at the time of the loan said to the lender, that the lot was nicely located, an excellent residence lot, only a little way from the business part of town, on a street leading right to the center of the city, and easily worth $1,200, was prosecuted for obtaining money by false pretenses; but the court held that all he said was mere general puffing and matter of opinion, which are no basis for a criminal charge under these statutes. Nicely located means one thing to one man, another to another, and it is doubtful if either party could say what it meant or had any definite idea on the subject; the value was clearly nothing but matter of opinion (57). But if there be a false pretense as to matter of fact, the criminality is no less by reason of the fact that it is united with matter of promise or opinion. One who obtained money by pretending that he was a single man and promising to marry the prosecutrix was guilty of obtaining money by false pretenses. Though it is probably true that his promise to marry helped to obtain the money, yet it is quite certain that without the false pretense he would not have obtained it (58). The pretense may be by action as well as by word or writing. One who dressed in the college uniform to induce a tradesman to think that he was a

(57) People v. Jacobs, 35 Mich. 36.

(58) Queen v. Jennison, 9 Cox C. C. 158.

student in the college, and thereby obtained goods on credit, was held to have obtained them by false pretense within the meaning of these statutes, though he said not a word about it (59).

§ 156. **What is obtaining.** If by false pretense one induces another to part with the possession only of his property and the taker then converts the property to his own use, this is clearly larceny at the common law; and as the statutes were enacted to supply the defects of the common law, what is criminal at the common law would seem not to be within the scope of the statutes. Such has been the interpretation by the courts.

§ 157. **What are goods, wares, and merchandise.** What could not be the subject of larceny cannot be the subject of the offense under these statutes. Therefore, obtaining a receipt by pretense would not be within the intent of the statute. The debt still remains, the fraud avoids the receipt, and the facts may be shown by parol. If a dog could not be stolen, which we have seen is a debated point, it is not within the statute to obtain one by false pretense. As one could not be convicted for stealing another's services, obtaining personal services by fraud would not be within the statute. As land is not a subject of larceny, a conveyance of the title obtained by fraud is not within the statutes. To all the statements above made, the qualifications should be added that the legislature might make such acts criminal, and it may be that this has been done in some of the states.

§ 158. **The essential intent.** This is a crime with two

(59) Queen v. Barnard, 7 Car. & P. 784.

essential criminal intents, the same as larceny, and these are to acquire the property and deprive the owner of it permanently. If the intent was not to acquire the property or not for the purpose of defrauding the owner the statute is not violated. A pauper who fraudulently told the overseer of the poor that he had no shoes, designing thereby to avoid being set to work on the road, was supplied with a pair; and it being then discovered that he had a pair before, he was prosecuted for obtaining goods by false pretense. The court held that he could not be convicted, for he made the fraudulent statement without any design to obtain goods thereby (60).

An intent to return the stolen property to the owner at some indefinite future day is held not to be sufficient to prevent the act of taking being larceny if the taker has not the power to return it after executing the purpose for which he took it, as if he took it to pawn. The same rule would seem to apply to this crime. But it was held that one who obtained money from another for a piece of land on representation that he owned it, intending at the time to buy it and immediately making a contract to purchase it and paying part of the price, was not guilty under this statute, though he never completed his intended purchase (61).

Section 10. Malicious Mischief.

§ 158a. In general. Malicious mischief is a common law offense, and consists in killing the animals or injur-

(60) Rex v. Wakeling, Russell & R. 504.

(61) Fay v. Commonwealth, 69 Va. 912.

ing other property of another, without hope or desire of gain, but out of a spirit of wanton cruelty or wicked revenge. The absence of motive and expectation of gain distinguishes it from larceny. If the animal of another is killed on the premises of the defendant to prevent it doing injury to him or his property, and when no other suitable means appears to be available and sufficient, the offense is not made out; it has even been held that if an owner of a pleasure resort destroys a boat on his pond to prevent continued trespasses by it, and after repeated removals of it, he is entitled to have submitted to the jury the question as to whether he did it out of revenge or to protect his possession (62). One who shoots a dog approaching him in a vicious and threatening manner on the highway and causing him to fear that he will be bitten by it, is not guilty of malicious mischief, though he well knew that the dog was in the habit of rushing out in this manner when anyone passed in the road, and other dogs in the community had the same habit (63). It has been said that at the common law no injury to real property would be more than a civil wrong; but, however this may be, there are now statutes in most of the states making it criminal to injure maliciously any orchard, tree, shrub, or building, etc. (64). If the injury is done by the accused under a claim of ownership, the necessary malice is evidently lacking and the injured party must seek his redress in his action for the tort.

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(62) People v. Kane, 131 N. Y. 111.

(63) Nehr v. State, 35 Neb. 638.

(64) State v. Watts, 48 Ark. 56.

CHAPTER X.

CRIMES AGAINST THE PUBLIC PEACE AND WELFARE.

§ 159. **Common barratry, maintenance, and champerty.** One who frequently stirred up suits and quarrels between the people was considered guilty of a misdemeanor in England called common barratry. One who officiously meddled in a suit that in no way belonged to him, by assisting either party with money or otherwise to prosecute or defend it, was considered guilty of another misdemeanor called maintenance, unless the party he assisted was his near kinsman, servant, or poor neighbor. Champerty was a species of maintenance, being a bargain with the plaintiff or defendant to divide the land or other thing sued for between them if they should prevail, in consideration for the assistance to be furnished. Prosecutions for such acts are practically unknown in this country; though it cannot be supposed that the acts themselves are any less frequent now than formerly; and it has been declared in a number of cases, in which the matter has arisen incidentally, that there are no such crimes in this country.

§ 160. **Breach of the peace.** Any unnecessary disturbance of the public by noises or violence is a common law misdemeanor. It may amount to some other crime; but it is at least a breach of the peace. To discharge fire-

arms near houses, for the purpose of annoying the inhabitants, is a criminal breach of the peace.

§ 161. **Forcible entry and detainer.** Forcible entry and detainer are common law misdemeanors, committed by violently taking lands or tenements with menaces, force, and arms, from the possession of another, without authority of law; or in like manner detaining them. These offenses are also regulated by statutes. One may lawfully detain by force what is his in right and possession; but if he is out and opposed by force, he should resort to court to obtain his due, unless he can put himself into possession peaceably.

§ 162. **Affray.** An affray is the act of two or more persons fighting in a public place, to the terror of the people and against the peace of the state. If the fighting be in a private place with no others in attendance it is but assault and battery. It takes two to commit this offense. If one assaults, and the other unwillingly defends himself only so far as is necessary, he is not guilty of affray. If one of the persons charged pleads self-defense and is acquitted on this ground, the other must be discharged also. If only words and threatening gestures are indulged in, but no attempt to use force, this may be a breach of the peace, but it is no affray.

§ 163. **Riots, routs, and unlawful assemblies.** These can be committed only by three or more persons, not by a less number. An unlawful assembly occurs when three or more assemble to do an unlawful act, as to pull down a house of another wrongfully, and part without making any motion towards executing their design. A rout occurs

when three or more meet to do an unlawful act upon a common quarrel and make some advance toward doing it. A riot is the doing of an unlawful act of violence by three or more, either with or without a common cause. If three or more persons agree to meet to furnish to a newly married pair that kind of a serenade usually enjoyed only by the entertainers, and commonly called a charivari, that would be a conspiracy; if they meet accordingly, that would be an unlawful assembly; if they then start to march to the place where the serenade is to be given they are guilty of rout; if they begin the performance they are guilty of riot.

§ 164. **Libel.** A libel is a malicious defamation of any person, made public by printing, writing, signs or pictures, tending to blacken the memory of the dead with intent to provoke the living, or injure the reputation of the living, provoke him to wrath, or expose him to hatred, contempt or ridicule. It is punished criminally because it tends to breaches of the peace; and at the old common law, proof of the truth of the statement was no defense, which may have caused the popular maxim: the greater the truth the greater the libel. Oral slander is merely a civil wrong not taken notice of by the state, but treated as the idle talk of wagging tongues. But words maliciously written or printed may be a libel which would not be civilly actionable if spoken. Malice is presumed from the proof of the publication. Publication is made when the matter is exhibited to anyone, even the person libeled only. But nothing privately written and shown to him only is a civil libel, though he permit others to see it.

What would otherwise be a libel may be excused on any of the several grounds of privilege: that it was published to one at his request and for his protection, as a report to a tradesman on the credit due to one asking for goods on credit; that it was published by a newspaper without malice as a part of the news of the day; that it was part of the necessary pleadings in a case in court, or a speech in a legislative body. If the publication is actually malicious it is an abuse of the privilege and destroys it. The publishers of newspapers and magazines are liable criminally for what appears in their publications though inserted by a servant without previous authority or subsequent ratification; for it would expose the public to too great danger if the offense could be committed and put off upon a subordinate. Proof of authority in such cases would also be hard to make.

§ 165. **Morals in general.** As immorality tends to undermine the foundations of society and impose burdens and expense on the public to care for the offenders and protect the rest of the public from the results, the worst forms of immorality are punished criminally. Immorality in public is criminal because it outrages the public sense of decency and tends to general immorality by others. The principal crimes of this sort are bigamy, adultery, miscegenation, incest, sodomy, seduction, illicit co-habitation, fornication, indecent exposure of the person, and uttering obscene and profane language.

§ 166. **Bigamy** is going through the form or ceremony of marriage by one having another spouse living. It was made felony by the statute of 1 James I, c. 11. By some

American statutes the crime is felony; by some, a misdemeanor. If one goes through the form of marriage having another spouse at the time, the crime is complete without any act of consumation. But if one whose first marriage was for any cause absolutely void goes through the form, this is not bigamy, for he has no other spouse living. If the first marriage was valid the offense is no less by reason of the fact that the second marriage was void on other grounds than the fact of the prior marriage. All bigamous marriages are absolutely void; and this argument logically applied would render all bigamy unpunishable. If one having a spouse living goes through the form of marriage with another, this second marriage is void; now if the first spouse dies or is divorced, and he then goes through the form of marriage with a third, this third marriage is neither bigamous nor void; for at the time it is celebrated the person entering into it has no other spouse living. The first marriage is dissolved by death or divorce, the second marriage never was of any validity, and so the third marriage is lawful and valid (1). Whether an honest but erroneous belief, on probable cause and due inquiry, that the other spouse is dead or divorced, is a defense to a charge of bigamy is a debated question, depending largely upon the construction of the statute under which the charge is made (2). Religious belief in bigamous marriages is clearly no defense (3).

§ 167. **Adultery** is illicit intercourse between persons

(1) Halbrook v. State, 34 Ark. 511.

(2) See this point discussed above § 27.

(3) See § 28, above.

either of whom is married to another. Under the English ecclesiastical law, by which such offenses were punished in the ecclesiastical courts in the early days of the common law, it was immaterial which party was married, the man or the woman, and both were guilty. There are three reasons for criminal punishment: (1) the introduction of a spurious heir to the estate, which could happen only in case of adultery by a married woman for which reason the old Roman law punished the offense in this case only, but punished both parties; (2) the violation of the marriage vow, which is committed only by the married party; and (3) the spread of immorality and the destruction of the family relation, the unit of civilized society, which is the reason that most states punish both parties. In a few states only the married party is punished for adultery. If one of the parties is innocent, having gone through the form of marriage to the other under the belief that he or she was single, the person so acting on probable grounds for so doing is not guilty.

§ 168. **Miscegenation** is a purely statutory crime, and consists in the marriage of persons of different race in violation of the statute prohibiting it. Such marriages are often declared by the statute to be absolutely void. The offense is no less by reason of the fact that the marriage is also void because bigamous.

§ 169. **Incest** is sexual intercourse between persons so nearly related to each other that a marriage between them would be illegal. It has been argued that the crime can be committed only by consent and only by two persons; and therefore if one party is not guilty because violated

without her consent, neither is guilty—that what is rape cannot be incest. The doctrine has been adopted by a number of states. But it is believed that the majority of the courts have repudiated the doctrine, and consider the lack of consent as material only as it bears on the credit due the testimony of the other party; for it is a rule of law that a criminal should not be convicted on the unsupported confession and testimony of an accomplice. It is no defense that either party is a bastard or descended from one. It is the blood relationship, not the legitimate relation, of the parties that is regarded.

§ 170. **Sodomy** or buggery is the unnatural carnal copulation of persons or of person with beast. The latter offense is also known as bestiality. It is doubtful whether the offense is felony or misdemeanor in the absence of statute, but it seems clear that it was a crime at the common law. If committed between persons both parties are guilty.

§ 171. **Seduction** is the act of enticing an unmarried female of previous chaste character to illicit carnal intercourse by persuasion and promises. It is doubtful whether it was criminal before the statute of 4 and 5 Philip and Mary c. 8. The offense differs considerably under the statutes of the different states. The usual promise, if not the only sufficient one, is a promise of marriage; and it has been held that if the promise was only conditional, to marry if pregnancy should follow the intercourse, such a promise is insufficient to found a charge of seduction on. It has been said that one can be seduced but once; but there is authority to the contrary. Al-

though a woman may have previously left the path of virtue on account of the seductive arts of some other person, she may have repented of the act and reformed; and yet it is clear that the evidence of reformation which would justify conviction for a subsequent act must be clear and convincing. It has also been held that the fact that indecent liberties were taken with a girl while she was of an age insufficient to enable her to comprehend the nature of the act or consent to it, does not render her liable to seduction with impunity after she attains her age and is leading a virtuous life. If a married man seduces a girl on promise of marriage, she not knowing that he has a wife, the promise is of course illegal, but this fact does not excuse him. If, however, she knows that he has a wife living, and his promise is to marry as soon as his wife shall die, or to get a divorce from her and marry, such a promise is meretricious and no foundation for a charge of seduction.

§ 172. **Fornication** is illicit sexual intercourse without any other of the aggravating circumstances included in the crimes above discussed. If not indulged in a public manner so as to amount to public indecency it was not criminal at the common law. Statutes on the subject will be found in most if not in all of the states making such acts misdemeanors.

§ 173. **Indecency.** Indecent public exposure of the person is a common law offense; but it has been held that the exposure must be to more than one person, and of course it must have been intentional. The keeping of a bawdy-house is a common law nuisance, and open and

notorious lewdness are punishable criminally without statute. The use of obscene and profane language, within the hearing of several members of the public, or in streets or other public places, is an indictable common law offense; but the indictment in such cases must allege, and the proof must show that the act was public and within the hearing of the citizens present. Such acts naturally tend to degrade the moral standard, and outrage the public sense of decency, and for this reason are punished. Public drunkenness and the frequenting of houses of prostitution are also criminal by statute.

§ 174. **Nuisance.** Nuisances are of two kinds, private, which injure only individuals and are mere civil wrongs; and public nuisances, which are criminal. A public or common nuisance is any act or neglect of duty which results in an injury or annoyance to the whole community. The result of the act is called a nuisance . The distinction between a private and a public nuisance is not always easy to draw, but the extremes are easily distinguished. An unnecessary noise which discommodes only one family would at most be a private nuisance, so of an offensive smell; but a stinking pig-sty near a highway so as to offend the general public in passing and repassing would be a public nuisance. It is not necessary to a conviction of this offense that the defendant intended any injury to the public or anyone. One who conducts a stone quarry near a navigable stream, and does not prevent his workmen allowing refuse to fall into the river so as to obstruct navigation is liable to criminal prosecution, and it is no defense that he had repeatedly commanded his

men that they must not permit obstructions to fall into the river. If the thing amounts to a nuisance it is no defense that it has been done from time immemorial, for right to maintain a nuisance cannot be acquired by prescription. It is no defense that it is a necessary incident of a business properly conducted and beneficial to the public. If the defendant cannot conduct the business without committing a nuisance he must leave the business to others more fortunately situated. A paint factory was established in the suburbs of the city of Detroit at a point remote from any house. In time the city grew to the vicinity of the factory. The boiling and preparing of the oils produced odors offensive to the smell and injurious to health. The fact that the business was conducted in a careful manner, producing no more inconvenience than was necessary to the business, that the city had grown about the plant after it was established there, and that the work was beneficial and necessary to the public, were held to be no excuse for the continuance of the business after it became a nuisance (4).

(4) People v. Detroit White Lead Wks., 82 Mich. 471.

CHAPTER XI.

CRIMES AGAINST PUBLIC JUSTICE AND AUTHORITY.

§ 175. **In general.** Any act which tends to impair the administration of public affairs is a direct and serious injury to the whole public and several offenses of this kind deserve special notice, more particularly the following: obstructing an officer, compounding a crime, misprison of felony, escape, prison breach, rescue, bribery, perjury, embracery, and contempt.

§ 176. **Obstructing an officer.** One who by force opposes an officer in the performance of an official duty is guilty of an indictable offense. It has been argued that if the officer is acting by color of his office the citizen must submit to the injury he may suffer thereby if any, and seek his remedy by action in the courts for damages. But many times the remedy in court is practically inadequate and amounts to nothing, and to say that the injury must be endured and such redress taken as may be obtained in court, would in many cases amount to a practical denial of the right. Therefore it was held that one who forcibly drove a sheriff off of his premises, when he was about to levy on and take away under attachment property exempt from seizure on any process, was not liable criminally for it; because the horses and tools that were about to be taken were the defendant's

only means of making a living; and by the time the question could be disposed of by action it would be too late to prepare and plant crops, his family would be a burden on the town, himself idle instead of earning a living, and the public altogether more injured than by the opposition to the officer (1).

§ 177. **Compounding a felony** is agreeing for a consideration not to prosecute for a crime committed. By such composition the government is defrauded of the revenues it might receive from the fine the criminal would pay on conviction. Whether the offense compounded is a common law crime or statutory, whether it is a felony or a misdemeanor it is criminal to agree not to prosecute it, unless there is a statute of the state permitting composition of such crimes.

§ 178. **Rescue, prison breach, and escape.** Rescue is the crime of aiding a criminal in custody to escape. It differs from prison breach only in the fact that prison breach is by the prisoner himself and rescue is by another. To convict the accused of prison breach it is necessary that the breach be made by himself or by others with his knowledge and assent and in privity with him; otherwise if he goes out through the breach he is guilty of escape only. If the prison is set on fire by any cause without the consent of the prisoner and he makes a breach to save his life, he is not guilty of prison breach. The breaking of the jail in an unsuccessful attempt to rescue or escape is an indictable offense. All these acts are common law crimes. The authorities are not agreed as to

(1) People v. Clements, 68 Mich. 655.

whether it is a crime to escape when confined on civil process. If there is no lawful commitment there is no crime in escaping; but if the warrant is lawful and the imprisonment valid the innocence of the accused is no justification for his escape. Escape is actual or constructive, voluntary or involuntary. Constructive escape is the act of the jailor in giving the prisoner illegal liberties. Actual escape is obtaining entire freedom. Voluntary escape is the act of the jailor in permitting an actual or constructive escape. Involuntary escape is the act of the prisoner escaping without the consent of the jailor; and if this is accomplished by means of the neglect of the jailor he is guilty of negligent escape. The prisoner who escapes without prison breach is guilty of a misdemeanor only, regardless of the crime on which he is confined. This crime is committed if the prison is left open and he goes out without obstruction.

§ 179. **Embracery** is any attempt corruptly to influence a jury in any action, by promises, persuasions, entreaties, money, entertainments, or the like. The crime consists in the attempt and not in the completed act, and therefore it is immaterial that it was not a successful attempt.

§ 180. **Bribery** is the voluntary giving or receiving of anything of value in corrupt payment for an official act. It has been thought by some that the offense of bribery relates only to an attempt corruptly to influence a judge or other official concerned in the administration of public justice; but the cases establish the broader doctrine that any attempt to influence any officer, executive, legislative,

or judicial, in the performance of his official duty, by the offer of a reward or pecuniary consideration is an indictable common law misdemeanor. The asking and acceptance of a bribe by an official was a felony at common law. There are also statutes on the subject in each state. The offense is complete when an offer of reward is made to influence the vote or action of the official. It need not be averred, that the vote, if procured, would have produced the desired result, nor that the official, or the body of which he was a member, had authority by law to do the thing sought to be accomplished. Suppose an application made to a justice of the peace, in the court for the trial of small causes, for a summons in case of replevin, for slander, assault and battery, or trespass, wherein title to lands is involved; over these actions a justice of the peace has no jurisdiction, and any judgment he might render therein, would be coram non judice and void; yet it can hardly be contended, that a justice thus applied to may be offered, and with impunity accept a reward, to issue a summons in any such case.

§ 181. **Perjury** is testifying falsely under oath concerning any matter material to the issue or cause in question in any judicial proceeding. One who testifies positively on a point as to which he is ignorant is guilty of the crime of perjury whether the statements he makes be true or false; for the gist of the crime is the wilful attempt to mislead the court. On the other hand, it is not common law perjury unless made in some judicial proceeding and pertinent to the question before the court. It is not to be understood that the oath must be admin-

istered in the court or the testimony given there; one who made a false oath to obtain release from imprisonment on execution was convicted of perjury, although the oath was by affidavit after judgment. The court said: "In the case before the court it is not denied that the oath was false, the intention wilful, the oath lawfully administered, and the assertion absolute. . . . . Here the magistrate had a general power to administer oaths, and the particular power to administer this oath. He was intrusted with a portion of the administration of public justice; for he was to decide, in some capacity, whether the oath should be administered. The question is not so much in what character the magistrate acted, as what was to be the effect of his act—would it affect the course of public justice? For that purpose we must look at the situation of the parties. After the usual course of litigation, the creditor had obtained a judgment and execution against his debtor, and had confined him to prison. The debtor wished to be relieved from the inconvenience of this judgment, and to deprive the creditor of one of the means of satisfying it, which the law had given him; and for this purpose took the oath which has given rise to this inquiry; and the effect of it is to relieve him from the operation of the judicial sentence, and to deprive the creditor of the benefit of it. Is not then the immediate effect to interfere with the course of justice? . . . . It was further said that here was no point in issue, or in the language of the law, nothing in debate between the parties. So far as regards the formal issue, this is true; and that will apply to every oath

collateral to the question at issue. But here the real question between the parties was, shall, or shall not, this debtor be liberated from his imprisonment, unless the creditor will support him? A question of deep interest to one party, and of some importance to the other, a question which the forms of proceeding cannot conceal.'' The court held that the false oath was perjury (2). Testimony having only a collateral relation to the case, for example, showing what credit is due the testimony of the witness, is sufficiently material to make a false oath on it perjury, as that he had never been convicted of a felony, or was not interested in the result of the suit.

§ 182. **Contempt** is a wilful disregard or disobedience of public authority; and is either direct, which openly insults or resists the powers of the court or persons of the judges who preside there, or indirect and consequential, which without any direct opposition or gross insolence plainly tends to create universal disregard of their authority. If the contempt be direct in the face of the court, the punishment may be and usually is summary, without formal accusation, pleadings, testimony, or argument, any one of which might accomplish the very disruption of the court's business designed by the original contempt. The court knowing all the facts by its own senses, needs neither information, testimony, nor argument to see their import; and so the court proceeds at once to order the punishment and its immediate execution. The power of keeping order, and of requiring a proper and decorous

(2) Arden v. State, 11 Conn. 408.

demeanor in a court room during the progress of a trial, lies at the very foundation of the administration of justice. Without it there can be no law and no justice, for if the law will not authorize the means necessary to insure its observance and proper administration, it must remain a dead letter. This inherent power to preserve order and respect for the court when in session is independent of any statute, and exists in every court from the highest to the lowest. From this action of the court in summarily preserving order and inflicting such punishment as is necessary for that purpose, there is no appeal nor remedy outside of the court making the sentence; unless it be by appeal to the pardoning power, which would interfere only in the grossest case. When, however, a court undertakes by process of contempt to punish a man for refusing to obey an order which the court had no power to make, the contempt order is as void as the original, and the prisoner will be released on habeas corpus from a superior court. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges see sufficient ground by affidavit or otherwise to suspect that a contempt has been committed, they either make an order that the suspected party show cause why an attachment should not issue against him; or, in very flagrant cases of contempt, the attachment may issue in the first instance, with opportunity to obtain discharge on cause shown; and upon the hearing the court either discharges the rule, makes it absolute, or modifies it as the case may require.

CHAPTER XII.

TREASON AND PIRACY.

§ 183. **Treason.** In the early days of the common law trials for treason occupied a prominent place; but with the advance of civilization and political liberty, such prosecutions have become almost unknown. In this country the United States Constitution declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court" (1). There have been only a few prosecutions for treason in the whole history of this country, of which the most celebrated was the trial of Aaron Burr.

§ 184. **Piracy.** Piracy is robbery or forcible depredation on the high seas without lawful authority, the same offense which would be highway robbery if committed on land, perpetrated in general hostility to all mankind, and is an offense against the laws of nations, punishable by any government which may apprehend the criminals. The common idea of a pirate is one who roves the sea in an armed vessel, on his own authority, without commission from any government, for the purpose of seizing by force

(1) Art. III, section 3, § 1.

and appropriating to himself, without discrimination, any vessel he meets. The crime may also be committed by the crew or passengers on any vessel by violently dispossessing the master and then carrying away the vessel or any of the goods on it. The development of modern commerce, the rapidity of communication, the vigilance of the commercial nations, and the immense floating citadels that carry the ocean commerce of today, have practically put an end to the roving pirate, who could neither equip and secretly man a craft able to cope with modern great ships; nor if he could take them could he escape with his plunder before he in turn would be captured and executed.

CRIMINAL PROCEDURE

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§ 1. Introduction. To trace the development of our system of procedure to its present stage would be a task too extensive for this brief article. We may assume that the earliest organized human society had laws, written or unwritten, for the suppression of crime,and that, whether by custom, judicial precedent, or legislation, systems of procedure gradually developed, crude, but having rules acknowledged and followed. Many of these were unjust, arbitrary, or cruel, and although their vicious features are now abandoned, yet they have generally left an imprint on succeeding systems.

The Saxons brought to England laws which were the result of many centuries of development on the continent.

These laws and customs generally remained under the rule of the Danes. The restoration of Anglo-Saxon power did not obliterate the foot-prints of the Danes; nor did the Norman conquest, sweeping as it was, introducing the feudal system, and establishing new conditions and laws to further the policy of the invaders, wipe out the great common law of the people. From the time of the conquest the common law of England continued its growth. Although modified by centuries of parliamentary legislation, the steady undercurrent of the common law has continued unbroken, and perhaps has affected the interpretation of succeeding statutes as much as it has been altered by them.

The early settlers of the English colonies of America brought with them the laws and customs of England, including criminal procedure, so far as they were adapted to American conditions, and these rules were molded by the customs and usages of the new land. This American common law, where unchanged by statute, governs the procedure of our criminal courts. Our systems of criminal procedure, while alike in a few fundamental principles, vary considerably according to localities and conditions. Each jurisdiction, whether national or state, has power to create its own system of practice, provided it does not conflict with constitutional provisions. Some of these principles are declared by the United States Constitution, others by state constitutions, others are so firmly founded in public opinion and tradition, that they do not need any express support by constitutions or statutes. For example, the ancient sentence

for high treason, and the practice of pressing prisoners to death to compel them to plead, are each so abhorrent, that even though we had no constitutional provision against cruel punishments, any effort to revive either practice would be ineffectual.

In this brief article, only general rules will be considered, leaving the reader to consult the statutes for local practice. The topics treated will include: (1) Arrests; (2) modes of prosecution; (3) certain special proceedings common in criminal practice; (4) procedure before trial; (5) the trial; (6) proceedings after trial; (7) appellate proceedings.

CHAPTER I.

ARRESTS.

§ 2. **In general.** In criminal procedure, an arrest consists in taking an individual into custody upon a criminal charge, so as to prevent his escape either before or after investigation or trial. In some instances this may be done without a written warrant; but where no emergency exists, the better practice is to secure a warrant from a judge, court or magistrate previous to the arrest.

According to the approved practice, the person about to be arrested, should first be informed of the purpose of the arrest. It has been held, that, if this is not done, resistance upon his part is justifiable (1). But circumstances may require the utmost expedition on the part of the officer or other person making the arrest, and when the person to be arrested is a dangerous character, who is likely to resist and endanger life, public policy seems to require concealment of purpose until by sudden decisive action complete custody may be had. It has been held that information of the nature of the arrest need not be given until a surrender has been made (2); but this doctrine certainly has its limits and was not intended as a sweeping declaration. Certainly under ordinary circum-

(1) Bellows v. Shannon, 2 Hill 86; State v. Phinney, 42 Me. 384.

(2) State v. Townsend, 5 Harr. (Del.) 487.

stances a citizen should not be required to surrender his liberty upon the arbitrary demand of either an officer or private person.

To make an arrest complete physical control is not necessary, for where a surrender is made custody is complete without any actual touching, which, in many instances, would be unnecessarily humiliating. The law does not require a needless display of force.

§ 3. **Arrests without written warrants.** The right of an individual to be secure from unreasonable physical restraint has long been a recognized doctrine of both American and English law. As a general rule, the individual is secure against arrest and detention, except upon written process issued by a court or magistrate for good cause shown; but emergencies frequently exist, where public policy and safety require immediate action, by either an officer or private person.

The English doctrine, as stated by Blackstone, was that an arrest without a warrant could be made by a constable for any felony, or for a dangerous wounding likely to result in a felony, or for a breach of the peace committed in his presence (3). Under this rule, if a murder, burglary, arson, or robbery is committed and is brought to the attention of the officer, he may arrest any one whom he has reason to believe has committed the crime, or if he finds a person dangerously wounded or receives reliable information of a dangerous wounding indicating a criminal assault, he may immediately proceed to capture the sup-

(3) 4 Bl. Com. 292.

posed offender. These are cases of emergency, where public policy and safety require immediate action.

§ 4. **Possible qualification of the common law rule.** The right to arrest without warrant at common law applied to any case of felony. As the common law rules were based upon considerations of necessity, public policy, and existing conditions, they should expand, contract, or disappear with changing conditions. During the period in which this rule of the common law was formulated, felonies were punished by death and forfeiture of goods, and a felon was regarded as an enemy to society, who, having committed a heinous crime, was ever on the alert to avoid its consequences. He was presumed not to exhibit himself in public places, or to be at any place where he would be easily found and captured by an officer—hence the law required that he should be sought, with or without a warrant, at any time or place.

Although it is generally conceded that this common law rule is a part of the law of our country, it may well be doubted whether it should be applied to all cases of felony. At present, but a few felonies are punishable with death, the usual punishment being imprisonment in the penitentiary. Congress and our state legislatures have greatly enlarged the schedule of felonies, extending it to cover matters not recognized as crimes in the earlier days of common law. At the present time the list of felonies includes many social, industrial, and commercial offenses, for which the offenders, unlike the felons of earlier days, have no inclination to flee from their comfortable homes to escape arrest; but are generally ready

whenever called upon by an officer, and in many cases voluntarily appear and give bail. Take, for example, the banker who receives deposits after his bank becomes insolvent. He is a felon, yet it would be unreasonable, if not unlawful, for a police officer, to dash into the bank without a warrant and take the banker before a magistrate, simply because some one has credibly informed the officer of the criminal act. As by the common law the rule was made to fit then existing circumstances, so modern common sense should confine its application to like circumstances.

§ 5. **Arrests without warrant for misdemeanors.** In an Illinois case (4) the court quoted the rule as given by Blackstone and affirmed a judgment for damages against an officer, who, without a warrant, made an arrest for vagrancy. In a later Illinois case (5) where a man had been convicted of murder in resisting arrest, the point was made, that, under the constitutional guarantees against unreasonable seizures and deprivation of liberty without due process of law, the attempted arrest was illegal, but the court said:

"Without deeming it necessary to indicate what we would hold in regard to the constitutionality of an act authorizing an arrest for a misdemeanor committed in the presence of an officer, where there would be no danger of the escape of the offender or the continuance of the offense if an arrest were not presently made, we have no

(4) Stanley v. Wells, 71 Ill. 78.

(5) North v. People, 139 Ill. 81.

hesitation in saying that it is within the principles of the common law in force in this state at and before the adoption of this provision of the constitution, to allow arrests to be made by sheriffs, constables and other like officers, for such misdemeanors committed in their presence as can not be stopped or redressed except by immediate arrest."

In a leading case (6) the supreme court of Michigan by writ of habeas corpus released a person who without a warrant, had been arrested, tried, and committed for vagrancy. For several reasons the court held the imprisonment null and void, one being that the power to arrest for a misdemeanor without a warrant was limited to breaches of the peace committed in the presence of an officer. The opinion was given by Chief Justice Campbell, who said:

"It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in presence of the officer. Quinn v. Heisel, 40 Mich. 576. . . . . The occasions which would justify arrest without process must be very rare indeed in cases of vagrancy; and in a city no larger than Detroit, persons charged with disorderly conduct can very generally be dealt with more legally and justly in the regular way, inasmuch as very much of it involves no immediate danger to public or private security.

(6) Sarah Way's Case, 41 Mich. 299.

"Making, as we are disposed to make, all proper allowances for zeal of police officers in dealing with persons who are supposed to be bad members of society, it is the duty of all courts to prevent good or bad citizens from being unlawfully molested. Official illegality is quite as reprehensible as private violations of law. The law of the land must be accepted by every one as the only rule which can be allowed to govern the liberties of citizens, whatever may be their ill desert.

"We think the proceedings in the case before us do not justify the detention of the prisoner, who is accordingly discharged."

Aside from the special powers granted by constitutional and statutory provisions, the above cases seem to announce the correct doctrine, i. e., that for minor offenses no arrests should be made without a warrant, except for an offense committed practically in the presence of an officer, and of such nature that the public peace requires immediate action. If an assault is made in the presence of an officer, which is being continued, or is likely to be renewed, the officer has the undoubted right to make an arrest; but if an officer sees an altercation between two neighbors, which has ceased before his arrival at the scene of action, and there is no probability of its renewal, he should not make an immediate arrest, but let the matter rest for regular proceedings by complaint and warrant.

§ 6. **Misdemeanors not committable by single acts.** There is a class of misdemeanors in which the offense does not consist of distinct and complete acts, susceptible of being viewed at a particular time, but in which the acts

or omissions by reason of their continuity resolve themselves into an illegal condition. For example, legitimate business may become a criminal nuisance, not because of any one act, but by reason of general carelessness in its conduct. Vagrancy does not consist in one act, or in any number of acts, but in a continued mode of life resulting in a condition. To be an inmate of a disorderly house does not consist of any one act, but in the general relation of the inmate to the conduct of the house. These offenses, by their very nature, are not on any single occasion completely committed in the presence of an officer, as may be an assault, but are only cognizable through the regular methods of prosecution. Even if an offender's name is unknown there is no necessity for his immediate arrest, for he may be otherwise described in a warrant.

§ 7. Raids. There is a class of illegal arrests, popularly known as "raids," or "pulls," which are supposed to follow the forms of law but are in direct violation of its principles. The usual custom is to procure a warrant for the keeper of a gambling or disorderly house, and then, in the night time with a detachment of police officers, to surround the house and arrest every person found in it, visiting patrons included, on the theory that all except the keeper are inmates, and subject to be arrested on view. These arrests are clearly illegal, in the absence of statutory authorization. First, as before stated, the offense of being an inmate is not a distinct act that can be committed on view. It is a matter to be determined by a judicial investigation, and is not to be passed upon by a ministerial

officer at the moment of making an arrest. Second, an inmate is one connected with the conduct of the house as distinguished from a patron.

§ 8. **Subsequent complaint after arrest without warrant.** The emergency which permits an arrest to be made without a warrant, ceases when the prisoner is brought before a magistrate for a hearing; for then the prisoner being securely in custody there is no further need of haste, and the magistrate has no power to proceed unless a charge in due form is made (7).

In Rhode Island, a justice of the peace, seeing an unlawful tumult, ordered the offenders to be arrested. On their being brought before him, he proceeded without any formal charge. For this he was held liable in a suit for damages, for, although the arrest was legal, the subsequent proceedings were held to be without jurisdiction and void (8).

There are several other decisions practically to the same effect (9). The fact that this practice may be common in many localities does not render it legal.

§ 9. **Arrest upon warrant: General requisites of warrant.** A warrant may be based upon an indictment, or upon an information filed by prosecuting attorney, or upon a complaint before a magistrate—methods which will be considered in the next chapter. The usual warrant is issued by a justice of the peace or police magis-

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(7) Bingham v. State, 59 Miss. 529.

(8) Tracy v. Williams, 4 Conn. 107.

(9) Wilcox v. Williamson, 61 Miss. 311; Prell v. McDonald, 7 Kan. 450; Burgis v. State, 4 Ind. 126.

trate, and must be founded on evidence presented to such justice or magistrate. On its face it must state the nature of the charge and give the name or a description of the person or persons to be arrested. The evidence on which it issues in some jurisdictions may be oral, while in others it must be in the form of an affidavit. The cause of arrest must be stated in apt words, yet the details of the crime need not be set forth—it is sufficient if details are set out in the complaint on file. The cause for arrest may be stated somewhat as follows: "Whereas by complaint under oath, made before me by John Jones, it appears that Peter Smith did on the sixth day of June, 1909, in the County of Cook and State of Illinois, commit the crime of assault and battery; therefore you are commanded to forthwith arrest the said Peter Smith," etc.

The obnoxious practice of issuing general warrants, to apprehend suspected persons, without naming or describing them, has long been discountenanced in England, and is expressly forbidden in most American states by constitutional or statutory provisions.

§ 10. **Same: Description of person to be arrested.** The warrant, being issued on evidence presented to the magistrate, and passed upon by him, can only operate against the individual or individuals against whom in his opinion sufficient cause for arrest has thereby been shown, leaving no discretion to the officer executing the warrant as to the person or persons to be arrested; consequently the warrant should describe the accused with such a degree of accuracy, that from the description alone, the officer may know whom to arrest.

Generally the accused is described by his known name; but if his name be not known to the magistrate, some other description should be given by which he can be identified. The supreme court of Maine held the following description to be insufficient: "A person whose name is unknown but whose person is well known of the vassalboro, in the county of Kennebec," the court saying: "The omission of the name, as a means of identification, is justified only on grounds of necessity; and when this is not known the warrant must indicate on whom it is to be served in some other way, by a specification of his personal appearance, his occupation, his precise place of residence or of labor, his recent history, or some facts which give a special designation that the constitution requires" (10).

A United States commissioner issued a warrant directing the arrest of James West, *really intending it for Vandy West, who was arrested by it.* Suit was brought for false imprisonment. The Supreme Court of the United States held that as he had never been known by the name of James West, he could maintain his action (11). In New Hampshire a writ directing the arrest of George Melvil was served upon George Melvin. Melvin brought suit for false imprisonment and obtained a verdict. In sustaining the verdict the court said: "It is well settled that he who causes another to be arrested by a

(10) Harwood v. Siphers, 70 Me. 464.

(11) West v. Cabell, 153 U. S. 78.

wrong name, is a trespasser, *even if the process was intended to be against the person actually arrested*" (12).

§ 11. **John Doe warrants.** There has long been a prevailing notion, unfounded in law and condemned by courts, that where the accused's name is unknown he may be described as "John Doe" or "Richard Roe." A warrant which directs the officer to arrest John Doe, is only valid against a person whose name is John Doe; nor is it any better if it directs the officer to arrest "John Doe, to be pointed out;" for the magistrate has no power to direct any other person to be pointed out as John Doe. If the officer is not acquainted with John Doe, he may seek information as to his identity; but that is the identity of John Doe, and not of an unknown person. In a New York case, the warrant directed the officer to "take the body of John Doe, the person carrying off the cannon," meaning Levi Mead, who at the time of his arrest upon the same warrant, was leading a horse attached to the cannon wagon. Mead brought suit for false imprisonment, and it was held that he was entitled to damages (13). In the same state a warrant was issued for "John Doe and Richard Roe," and was served upon Samuel W. Lovell, one of the persons for whom it was intended, who was tried and convicted. It was held that he could maintain an action for false imprisonment (14).

In Massachusetts a complaint was filed charging that

(12) Melvin v. Fisher, 8 N. H. 406.

(13) Mead v. Haws, 7 Cowen 332.

(14) Gurnsey v. Lovell, 9 Wend. 319.

"John Doe or Richard Roe whose other or true name is to your complainant unknown" had committed assault and battery; upon which a warrant to the same effect issued, and an effort was made to arrest Morris Crotty, *for whom the warrant was actually intended.* Crotty and his friends made a vigorous resistance, for which they were indicted for riot; but the supreme court held that the resistance was lawful in that the warrant should have given the best possible description of the person to be arrested (15).

§ 12. **Treatment of prisoners subsequent to arrest.** Unless there is an express practice to the contrary, the law requires that a prisoner, arrested with or without a warrant, must be taken before a court or magistrate, with the least practicable delay. The court or magistrate may then immediately proceed to hear the matter, or may postpone it to a future time, and admit the prisoner to bail, if the charge be a bailable one. Notwithstanding the well settled condition of the law in this regard, public apathy has permitted a vicious practice to grow up in our large cities, by which prisoners are taken to police stations and there confined a considerable time before they are permitted to appear before a court or magistrate. The officer generally attempts to justify this illegal detention, on the ground that each prisoner must be "booked" at the station, and that the prosecution should have time to prepare the case against him. There is no

(15) Com. v. Crotty, 10 Allen 403.

necessity to "book" a prisoner at the station, when there is no necessity for temporary confinement; nor have the police officers authority to delay proceedings, while the case is being prepared, for that is a matter exclusively within the control of the court or magistrate (16).

(16) Wright v. Court, 6 Dowl. & Ry. 623.

CHAPTER II.

MODES OF PROSECUTION.

§ 13. General classification. There are four recognized methods of criminal prosecution: (1) By indictment; (2) by information; (3) by criminal complaint; (4) by summons.

Section 1. Indictments.

§ 14. The grand jury. A grand jury is the grand inquest of the county, which should not only inquire into the general subject of crime, but should keep a keen watch upon public institutions and public officials. As a general rule, it should consist of representative men, selected from the county at large. Blackstone says, they should be picked from the county at large, "some out of every hundred," and that they "are usually gentlemen of the best figure in the county" (1). Generally the grand jury is impaneled at the opening of a term of court, and is given a few general instructions by the judge, as to their powers and duties; after which they retire to their own room, and proceed in a great degree independent of the court. The sessions of the grand jury are secret. None other than themselves and the witness testifying should be present, except the prosecuting attorney, who by their

(1) 4 Bl. Com. 302.

consent may be admitted into the grand jury room to advise them as to the law, or to examine witnesses. He should not express his opinion on the evidence, and he should always retire before they discuss the evidence or take a vote (2). The practice of prosecuting attorneys in entering a grand jury room without an invitation, and remaining there throughout the deliberations and voting, is a pernicious one. His presence, in itself, may have a prejudicial effect, and restrict freedom of discussion among the jurors. Although there may be some conflict of opinion, it is the better rule that any indictment discussed or voted upon in his presence should be promptly quashed by the court.

Of late years, proceedings before grand juries are coming to be regarded as matters of form. Indictments are often voted upon hearsay testimony, or upon formal proof at the request of the public prosecutor. Accumulation of business is alleged as an excuse for the undue haste with which cases are considered, but if the grand jury cannot properly dispose of all the business upon its docket, it should do what it properly can and leave the responsibility with the court, to impanel an extra grand jury, or to discharge the prisoners awaiting action. The grand jury system properly conducted, stands between the people and unjust prosecutions; and is the means to investigate fraud and official corruption.

§ 15. **Presentment of indictments.** If a bill before a grand jury receive twelve affirmative votes, it is endorsed,

(2) Gitchel v. People, 146 Ill. 175.

"A true bill." When a grand jury is ready to make a report, it appears in open court, and after the roll is called by the clerk of the court, if a quorum of twelve is present, the foreman, in the presence of the other grand jurors, presents such indictments as are found to the presiding judge, who passes them to the clerk to file. This completes the presentment. The indictments then become a part of the files of the court, and *capiases* are immediately issued that the accused persons may be brought into court, and either bailed or committed to jail. So zealously does the law regard the rights of the accused, that it is a well established rule of procedure, that unless the record shows that the indictment was presented in open court, a verdict of guilty by a trial jury cannot stand (3).

§ 16. **The indictment.** An indictment is a written accusation setting forth the charge against the defendant. It should be clear and certain in its language, so as to enable both the court and the defendant to understand the precise nature of the charge. Considerable of the technical nicety of language required by the earlier practice in England has been abandoned. In several jurisdictions we have statutes which declare that an indictment charging the offense in the language of the statute defining it, or so as to be easily understood, is sufficient; but these statutes do not repeal the fundamental rule that the essential facts constituting the offense must be stated (4).

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(3) Aylesworth v. People, 65 Ill. 301.

(4) U. S. v. Carll, 105 U. S. 611; Brown v. State, 116 Ga. 559.

An indictment should describe the defendant by his full name, state the time and place of the supposed offense, and the facts constituting it.

§ 17. **Names of persons.** In setting out the name of the defendant or other person necessary to be named, initials should not be used, except for a middle name. Generally the middle name is not considered material; yet in some instances it may be, as where a party customarily uses it. For example, the names: Henry Ward Beecher, and Oliver Wendell Holmes. In either of these instances, the omission of the middle name might cloud the identity.

§ 18. **Allegations as to time.** A date for the alleged offense should be stated. At common law it was improper to allege the date as "on or about," though in a considerable number of states statutes permit it now. Although a date be alleged, the courts will generally permit a different date to be proven, for the prosecution should not fail because witnesses do not remember exact dates, or disagree as to them. If, however, the date is descriptive of a record, as, for example, the date on which a perjury was committed in court, or is essential to the offense, as selling liquor on a holiday, then the date alleged must be strictly proven or the case will fail.

§ 19. **Venue. Local description.** Generally speaking, it is sufficient to allege that the supposed offense was committed in the county where the indictment is presented, for that shows the power and jurisdiction of the court to entertain the charge. This is what may be termed pleading the venue. The venue must not only be pleaded in the indictment but must be proven on the trial. There are

cases, however, in which a special locality must also be alleged and proven. Thus, in charges of burglary, arson, or keeping a gaming-house, a particular building or locality must be described, and proved as described.

§ 20. **Matters of description.** In describing persons, or things, the pleader should exercise great care that his descriptions are accurate; for in matters of description the proof must strictly conform to the allegations in the indictment. Not only should the pleader be careful that the description is accurate, but that it is not too minute; for, in matters of description, that which is unnecessary to state, when stated, may become a material part of the accusation and must be proven. Thus, where an indictment charged the larceny of a hog with a crop off the *left* ear and a slit in the *right* ear, and the owner testified that the stolen hog had a crop off the *right* ear and a slit in the *left* ear, it was held by the supreme court of Georgia, that the proof did not sustain the indictment (5). The defendant was indicted for the theft of a particularly described hog, and on that charge alone was he placed upon trial. However, when the proof is accessible, the better practice is to give a description, by which the property or article may be identified from other articles of its general class, and at the trial present evidence which will conform to the indictment (6).

§ 21. **Pleading a statutory exception.** If, in defining a crime, a statute declares an exception, then an indict-

(5) Robertson v. State, 97 Ga. 206.

(6) For collection of cases with editorial notes see 13 Am. Cr. Rep. 675-732.

ment under this statute must allege that the case does not come within the exception; but if, after a statute defines the crime, and has declared a penalty, it states an exception in a *proviso,* the indictment need not refer to the exception, for that is a matter of defense. To illustrate: In a Georgia case, the indictment was founded upon a statute which read as follows: "If any person shall, between dark and daylight, wilfully and wantonly fire off or discharge any loaded gun or pistol on a public highway, or within fifty yards of a public highway, except in defense of any person or property, or on his own premises, he shall be guilty of a misdemeanor." The court held, that it was necessary to allege in the indictment and prove upon the trial, that the firing was not done in self-defense or on defendant's own property (7); but had the exception appeared in a *proviso,* and not in the enacting clause, it would have been a matter for the defendant to prove that he was within the exception. In other words, the burden would have been on the defendant to prove self-defense, or that the firing was on his own property, if the statute had read as follows: "If any person shall, between dark and daylight, wilfully and wantonly fire off or discharge any loaded gun or pistol on the public highway, or within fifty yards of a public highway, he shall be guilty of a misdemeanor; *provided,* however, that this statute shall not apply to cases in which such firing is done in defense of person or property, or upon the person's own premises."

(7) Rumph v. State, 119 Ga. 121.

§ 22. **Separate counts of the indictment.** An indictment may contain several counts, each count appearing as a separate charge, yet referring to the same matter. For example, where there is a doubt as to the ownership of stolen property, one count may charge the stealing of the property of A; another may charge the same theft as of the property of B; while another count may describe it as being of the property of both A and B. Or an indictment may charge burglary in one count, and in another count larceny committed at the time of the burglary. In felony cases, all of the counts must refer to the same general matter. In indictments for some of the minor offenses, several distinct offenses may appear in separate counts. In cases for selling intoxicating liquor, there may be any number of illegal sales set out in separate counts, each count being of the nature of a separate indictment. This rule was applied in the late celebrated prosecution of the Standard Oil Company in Indiana. The defendant was found guilty of 1462 separate violations of law under 1462 separate counts of the same indictment.

Section 2. Informations.

§ 23. **Definition.** An information is a written accusation made by a prosecuting attorney, and filed in court. Informations are of ancient origin. They have long been used in England in prosecutions for misdemeanors, but not for felonies. During the reign of Henry VII a statute was enacted allowing them to be filed by any informer. Blackstone, in speaking of this act, and of the court of star chamber, says: "Then it was that the legal or or-

derly jurisdiction of the court of king's bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of King Henry VII) by hunting out obsolete penalties and this tyrannical mode of prosecution, with other oppressive devices, continually harassed the subject, and shamefully enriched the crown" (8). This statute being repealed previous to the establishment of the English colonies in America, is not a part of our common law, but an information is permitted by statute in an increasing number of states.

§ 24. **Requisites of information.** When it takes the place of an indictment, it must conform to the same rules both as to matters of substance and form. It has been contended that an information need not be upon a special oath, verifying its contents; but that it may be presented upon the official oath of the prosecuting attorney. This contention seems unsound, especially in those jurisdictions, where, by the constitution it is declared that no warrant shall issue except upon proper cause, supported by oath or affirmation (9). In 1874, the legislature of Illinois attempted to grant to states attorneys the privilege of filing information not verified by affidavit. Upon a writ of habeas corpus the act was held unconstitutional in a very able review of the law by Judge McAllister, one of the judges of the supreme court (10).

§ 25. **Growing tendency to favor prosecutions by information.** In late years, several states of our country

(8) 4 Bl. Com. 310.

(9) Myers v. People, 67 Ill. 301; Johnston v. U. S., 87 Fed. Rep. 187.

(10) People v. Brown, 6 Chi. L. N. 392.

have enacted statutes favoring the filing of informations, which, if unrestricted, would be a dangerous practice. However, in some of those states, the law requires investigation by a magistrate, previous to the filing of an information in a court of record. To grant to prosecuting attorneys an unlimited discretion in determining whether a criminal prosecution should or should not be instituted, may be thought to confer too much power upon those officials, a power sometimes abused both in England and America, while a grand jury, selected from the non-official element of the county at large, composed of persons of various vocations, beliefs, and political views, is a representative body of the people, and its united action is more likely to be free from improper prejudices or influences, which may affect an individual mind.

Section 3. Criminal Complaint.

§ 26. Definition and requisites. In many jurisdictions the law permits prosecutions for petty offenses to be instituted by the filing of an affidavit, commonly called a "criminal complaint." The complaint must clearly and positively state the facts constituting the offense, for it is the evidence under which the warrant issues. Under constitutional provisions, no warrant should issue except for proper cause supported by oath or affirmation. A complaint should be so clear and positive that, if the same statement was given orally in open court, it would be competent testimony. It should be so clearly stated that, if falsely made, an indictment for perjury could be maintained against the complainant. It is not proper that the

complaint be made simply on information and belief, for that would be of the nature of hearsay testimony, and upon it no indictment for perjury would lie, if falsely made. If the statements in a complaint do not show all the essential elements of the crime, a conviction upon it is set aside on appeal (11), or the prisoner may be discharged by a writ of habeas corpus (12). In Vermont it is held that, as a court does not take judicial notice of city ordinances, a complaint for violation of one must set out the ordinance itself (13).

Section 4. Summons.

§ 27. **Prosecution by summons.** As a corporation cannot be arrested, it is brought before the court by virtue of a summons served upon it, which gives the court complete jurisdiction. In the early days in New England, criminal prosecutions could be instituted against ordinary individuals, in this manner (14). At the present time there are statutes, in various localities, which permit such prosecutions against individuals for certain minor offenses, such as illegal sales of liquor, or practicing medicine without a license.

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(11) State v. Murray, 11 Iowa 580; Glenn v. People, 17 Ill. 105.
(12) Sarah Way's Case, 41 Mich. 299.
(13) State v. Cruickschank, 71 Vt. 94.
(14) B. C. & M. R. R. v. State, 32 N. H. 315.

CHAPTER III.

SPECIAL PROCEEDINGS COMMON IN CRIMINAL PRACTICE.

§ 28. **Preliminary examinations.** Strictly speaking, a preliminary examination is not a criminal prosecution, but is simply a means designed to prevent escape until the grand jury can investigate the commission of an indictable offense. In ordinary cases, this method ought not to be resorted to, for it is not the key to the grand jury room. It is a needless proceeding, unless there is danger that the criminal or suspected person may escape before the grand jury can present an indictment. If there is no danger of escape, the grand jury, and not a magistrate, should take the initiative. To have a long investigation before a magistrate, previous to an indictment, in a matter where there is no danger of escape, is a costly and unnecessary proceeding and not consistent with good practice; yet this is often required by prosecuting attorneys as antecedent to a grand jury investigation.

§ 29. **Same: The practice.** In cases where the accused has been arrested without a warrant, the proceeding is instituted by bringing him before a magistrate and presenting the accusation in the form of an affidavit. If no previous arrest has been made, a complaint and warrant must precede the arrest, but the practice is not the

same in all jurisdictions. In Wisconsin, the complaint must be in writing, but need not be under oath (1). In Michigan, the complaint need not be either in writing or under oath (2). In each of these states, the constitution simply forbids that a warrant should issue except for probable cause, supported by oath or affirmation, which may be oral; and the language of the statutes, which permits the warrant to issue upon oral evidence, prevails. In Illinois, the constitution requires the probable cause to be supported by *affidavit,* consequently there the evidence must be in writing or the warrant is void (3). Wherever the complaint must be in writing and under oath, the complaint or evidence in writing must show facts constituting a crime, and probable cause to believe the accused to be the guilty person. If one witness has not sufficient knowledge, several affidavits may be placed on file. If the affidavit or affidavits are made on information and belief, the proceedings are void, and the prisoner may be released by a writ of habeas corpus (4).

When the prisoner is brought before the magistrate, the matter may be immediately heard, or it may be postponed for a reasonable time. When the matter is heard, if from the evidence the magistrate is satisfied that the alleged crime has been committed, and that there is a strong probability that the prisoner is the guilty person, the

(1) State v. Davies, 62 Wis. 305.

(2) Turner v. People, 33 Mich. 363.

(3) Lippman v. People, 175 Ill. 101.

(4) Schustek's Case, 11 Am. Cr. Rep. 372; Ex parte Dimmig, 74 Cal. 164.

prisoner should be committed to await the action of the grand jury, or admitted to bail if the offense is a bailable one.

§ 30. **Search warrants.** A search warrant may be termed an auxiliary writ, issued in aid of a criminal case to obtain evidence of guilt. Search warrants were not always known to the law; but the practice crept in gradually (5). To obtain a search warrant, an affidavit should be filed, alleging that certain stolen property is concealed at a certain place. The alleged stolen property and the place to be searched must be particularly described. The warrant must also particularly describe the place to be searched and the thing or things to be seized. If the affidavit sets forth the crime as committed by a particular person, the warrant may provide for his arrest (6), but otherwise it should not. When the articles seized are brought before the magistrate and he finds them subject to the seizure, he should order that they be kept until no longer needed in evidence, after which they should be restored to the owner; but the question of ownership is not finally settled by the magistrate.

§ 31. **Other uses of search warrants.** Under constitutional prohibitions against unreasonable searches and seizures, it has been doubted whether search warrants can be extended beyond their original uses; but statutes extending them have long been recognized. Search warrants are used for the seizure of gambling implements, obscene pictures, lottery tickets, and so forth. When the

(5) Robinson v. Richardson, 13 Gray 454.

(6) 1 Bish Cr. Pr. 208.

articles are no longer needed in evidence, if they are found to be contraband, the magistrate should order that they be destroyed. In regard to gambling implements, it has been held that they need not be as particularly described as is required in cases of stolen property (7). The owner of a stolen article is generally capable of giving a particular description of it, so that it can be distinguished from other property of the same kind, and thereby prevent a seizure of another person's property; but the same knowledge is not generally possessed by the complainant in a gambling case, where the warrant is not designed for a particular piece of property, but for gaming implements of various kinds and quantities used at a certain place. However a reasonable degree of certainty should be required even in gambling cases.

§ 32. **Peace warrants.** The practice of obtaining peace warrants is much the same as that pertaining to preliminary examinations. The affidavit or evidence on which the warrant is issued should show that a threat has been made and that there is danger of its being executed. The general rule, that husbands and wives are not competent witnesses against each other, does not apply to peace warrants. If, upon a hearing, the magistrate finds from the evidence that a serious threat has been made, and that there is danger of its being executed, he may require the accused to give a peace bond, and on his failure to do so may commit him. The practice is largely regulated by local statutes.

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(7) Frost v. People, 193 Ill. 635.

§ 33. **Extradition.** Extradition proceedings are designed for the capture and return of fugitives from justice. There are two kinds, international extradition and interstate extradition. With us, extradition is not a matter of comity; it is entirely governed by definite laws.

§ 34. **International extradition.** International extradition is regulated by treaties, and applies to but a few crimes. It is not permitted in cases based upon political offenses. In our treaties with foreign nations, we expressly stipulate which crimes shall be extraditable. In a treaty with England, it was provided that extradition only applied to such enumerated crimes as were recognized offenses in both the United States and England. In a noted case, where England demanded the surrender of a fugitive, the point was made that the act complained of had not been declared a crime by any act of Congress; but the United States Supreme Court held that as it was a crime under the laws of New York, where the fugitive was found, it was within the meaning of the treaty (8).

§ 35. **Interstate extradition.** Article IV, section 2, of the Constitution of the United States provides: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, or be removed to the state having jurisdiction of the crime."

Many years ago it was held by the Supreme Court of the United States (9) that this provision of the Consti-

(8) Wright v. Henkel, 190 U. S. 40.

(9) Kentucky v. Dennison, 24 How. 66.

tution was not self-acting, but that it required a law of Congress to put it into effect. Section 5278 of the Revised Statutes of the United States, provides: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from which the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured;" and, after certain preliminaries had, to deliver him to the authorities of the demanding state. Before the executive warrant can issue under the above section, it must appear by the papers accompanying the requisition of the demanding governor: (1) That a crime has been committed by a person who, at the time, was actually within the territorial limit of the demanding state; (2) that the offender subsequently fled into another state, and is within the state on which the demand is made; (3) that he has been accused either by an indictment found by a grand jury or by an affidavit made before a magistrate in the state from which he has fled.

§ 36. Applies to all crime. It will be observed that extradition applies to, "treason, felony or other crime." By a well known rule of construction, it would seem that

the words, "or other crime," should be restricted to serious crimes similar to felonies, and not to misdemeanors; but the Supreme Court of the United States has held, that the words "or other crime" include every crime known to the law. This construction offers possibilities of abuse; for by it, a person who in good faith removes to one state from another can be carried back and prosecuted for some technical or trifling offense, regardless of distance, or the sex, or condition of the accused. This is a proper subject for congressional regulation.

§ 37. **Who is a fugitive from justice?** In order to render the extradition laws effective, it is held that if a person, being within the territorial limits of a state, commits a crime in it, and then even for a legitimate purpose, leaves the state previous to trial, he is a fugitive from justice. However, to make a person a fugitive from justice, he must have been actually present within the demanding state at the time of the offense. A constructive presence is not sufficient (10). Thus, where a person standing within North Carolina fired across the state line, and killed a person in Tennessee, it was held that he was not guilty in North Carolina, for the homicide was in Tennessee (11); yet he could not be extradited, because he did not flee from Tennessee (12).

§ 38. **The governor not compellable to grant the warrant.** It has long been settled by the United States Supreme Court that there is no power to compel a governor

(10) Hyatt v. People, 188 U. S. 691.
(11) State v. Hull, 114 N. C. 909.
(12) State v. Hull, 115 N. C. 811.

to grant an extradition warrant (13). It is generally conceded that the claims of the demanding state are not superior to the state on whom the demand is made. If a demand is made upon a state that has any special claim upon the presence of the accused, the requisition need not be honored. Where a prisoner escaped while being conveyed from Texas to Alabama, and then fled back to Texas and there resisted an effort to retake him, wounding an officer, it was held that he should be retained in Texas until he was tried for the latter crime (14).

§ 39. **For what may the extradited criminal be tried?** One who has been brought by extradition from a foreign country can be tried only for the offense on charge of which he was surrendered up, for it has been thought that to procure his surrender on one charge and then try him on another might be considered a violation of faith with the other country, and embarrass future extradition. But when one has been surrendered by the authorities of one state to the authorities of another he may be tried in the latter state, not only for the crime on charge of which he was surrendered up but on any other charge whatever (15).

§ 40. **Trial of criminals kidnaped and returned.** It has been held by the Supreme Court of the United States that if a fugitive from justice be kidnaped in a foreign country and brought back, he cannot avail himself of the

(13) See note (9) above.

(14) Ex parte Hobbs, 32 Tex. Cr. Rep. 312.

(15) Lascelles v. Georgia, 148 U. S. 537.

irregularity but must stand trial upon the criminal charge.

If the foreign government makes complaint, the question will then be considered. If the defendant has been injured by the unlawful act of others, the courts are open to him to obtain redress for this wrong, but that is no reason why he should not be punished for his own crime (16).

Where a criminal was kidnaped from another state, it was held legal to refuse his return upon the demand of the governor of the state from which he was taken (16a).

§ 41. **Habeas corpus.** This ancient writ applies to both civil and criminal proceedings. Aside from the suggestion that it is often resorted to in determining the right to the custody of children, or to bring prisoners into court to testify as witnesses, we shall treat it purely as a writ of liberty.

§ 42. **Its use in criminal proceedings.** The writ of habeas corpus is not a writ to correct errors, but to restore liberty, unlawfully withheld. Guilt and innocence are not subjects of its inquiry. It inquires into matters of power and jurisdiction, and as to the legality or illegality of the restraint. If the imprisonment is upon an arrest without a warrant, the inquiry is whether there was a legal cause for the arrest. If the imprisonment is by virtue of a warrant, the complaint on which the warrant issues may be brought into question. If the imprisonment is based upon an indictment, which is not

(16) Ker v. Illinois, 119 U. S. 436.

(16a) Mahon v. Justice, 127 U. S. 700.

only fatally defective but the context of which shows that there are no grounds for a prosecution, habeas corpus is a proper remedy (16b). If the prosecution is based on an unconstitutional act of a legislature, the prisoner is entitled to be discharged upon writ of habeas corpus, because such an act is considered, not to possess the character of law (16c). If a court, in passing sentence, is improperly constituted, as where the law requires three judges and only two preside, the sentence and imprisonment are void, and the prisoner may be discharged upon a writ of habeas corpus (17). If a court is properly constituted and has jurisdiction of the case before it but renders a sentence not authorized by law, the person so imprisoned may be released by writ of habeas corpus (18). Although the court will not inquire into the evidence on which a conviction is based, it will into the evidence upon which a prisoner is held to await the action of the grand jury (19). If a prisoner is denied his right to give bail, or if the bail is fixed at an unreasonable amount, he may be admitted to bail through a writ of habeas corpus. It was even held, after a prisoner had served seventeen years in a penitentiary, that he was entitled to his release upon a writ of habeas corpus because the indictment against him had been returned by an illegally constituted grand jury (20).

(16b) State v. Huegin, 110 Wis. 189.
(16c) Ex parte Ogle, 61 S. W. Rep. 122.
(17) Ex parte Prince, 27 Fla. 196.
(18) Ex parte Seibold, 100 U. S. 371.
(19) In re Devine, 21 How. Pr. 80 (N. Y.).
(20) Ex parte Cox, 3 Idaho 530.

§ 43. The practice in issuing it. While the practice may vary in the different states, the general rule is for the person restrained, or some one in his behalf, to present a petition to a court or judge, setting out the illegal detention, and praying for a writ of habeas corpus. The writ is then issued, commanding the person having the custody of the prisoner to produce him in court or before the judge, immediately, or at a fixed time. In some instances, where there is danger that the writ will be disobeyed, the writ directs the officer serving it to take possession of the prisoner immediately and bring him into court or before the judge. The person against whom the writ runs should present in writing his reasons for holding the prisoner, which is called his "return." To this the prisoner may reply, and the case is then ready for a hearing. If the court or judge finds that the imprisonment is illegal, the prisoner is immediately given his liberty. If it is a question of bail, he is either admitted to bail or remanded back into custody.

CHAPTER IV.

PROCEDURE BEFORE TRIAL.

§ 44. **Right to counsel.** There was a time in England when persons charged with felony were not permitted to have the assistance of counsel; but now, both in England and our country, in any criminal case the accused has the right to appear both in person and by counsel, and, if he is unable to employ a lawyer, counsel will be appointed for him by the court. Not only does the right of counsel exist at the trial, but from the time of arrest the accused is entitled to such benefit—a right which the station-keeper or jailor is bound to respect.

§ 45. **Bail.** In all criminal cases, except capital cases in which the evidence is strong, the accused is entitled to be admitted to bail in a reasonable amount, which amount is usually fixed by the presiding judge or magistrate. The bail required should be sufficient in amount to insure the presence of the accused at the trial; but should not be exorbitant; for that in effect would be a denial of his constitutional rights.

§ 46. **Arraignment.** By the old English practice, the accused was brought before the court and the indictment distinctly read to him; whereupon he was called to plead to the charges therein set against him. By our practice, he is generally entitled to a copy of the indictment prev-

ious to his arraignment, and the reading of the indictment is usually dispensed with. At the arraignment he may either plead in abatement, move to quash the indictment, demur to the indictment, plead former jeopardy, plead not guilty, or plead guilty. A plea in abatement should be entered at the earliest possible moment; hence it comes before a motion to quash, while the other pleas are subsequent to the motion to quash.

§ 47. Ancient practice. Standing mute. Pressing to death. Under the old English practice, when a prisoner was arraigned for any felony other than high treason and stood mute or silent, the court impaneled a jury to determine whether his silence was the result of nature or obstinacy. If the jury found that he was dumb by nature, a trial was had the same as though he had pleaded not guilty; but if the jury found that his silence was the result of obstinacy, very severe measures were taken to compel him to plead; for the law was then very technical and no trial could be had unless there was an issue joined by the defendant denying the charges in the indictment. At this point a sentence was distinctly read to him that he might know his danger, and a respite of a few hours given him. In speaking of this respite Blackstone says: "Thus tender was the law of inflicting this dreadful punishment;" but Blackstone fails to tell us what occurred during the respite. Kelynge gives us an account of the procedure during the respite, as it was in the reign of Charles the Second (1). In speaking of the case of one

(1) Thorley's Case, Kelyng 27.

George Thorley he says that the prisoner was sent out with his two thumbs tied together with whip cord that the pain thereof might cause him to plead; and that a minister was sent out to persuade the sufferer; and that in an hour Thorley was brought back and entered his plea.

If the prisoner remained obstinate, the sentence of the court was read to him, which was substantially as follows: That he be put in a low dark chamber; then laid on his back naked upon the bare floor, except where decency forbids; that his arms and legs by the use of cords be stretched toward the four corners of the room; that upon his body be placed a great weight of iron, as much as he could bear, and more; that upon the first day he be given three morsels of the worst bread; that on the second day he be given three draughts of standing water, that should be nearest to the prison door; that this should be his diet alternating daily, till he died, or, as the ancient judgment ran, until he answered (2). The practice of pressing to death did not apply to cases of high treason or to misdemeanors. In those cases the silence of the accused was considered the same as a plea of guilty.

§ 48. **Same: A New England case.** There is at least one noted instance of this infamous practice west of the Atlantic. In the days when witchcraft prosecutions were had both in Europe and America, Giles Corey, a citizen of Massachusetts, eighty years of age, was arraigned for that imaginary offense, and, well knowing that a convic-

(2) 2 Hale's P. C. 319; 4 Bl. Com. 327.

tion would follow either a plea of guilty or not guilty and take both his life and the *substance of his family,* he bravely stood mute. For this he was sentenced to be pressed. The pressure was so great that the dying man's tongue protruded. The refined sensibilities of the devout sheriff were so shocked at this involuntary rudeness that he pushed it back with his cane (3).

§ 49. **Plea in abatement. Misnomer.** A plea in abatement does not attack the substance of an indictment, but refers to some irregularity regarding it. If the grand jury is improperly selected or impaneled, if improper methods are used in obtaining the indictment, if persons other than grand jurors are present at the voting of the indictment, if the defendant is indicted by the wrong name, or if some other irregularity has happened which does not appear on the records, such facts may be set out in a plea in abatement. If the charges in the plea in abatement are found to be true the indictment is quashed but a new indictment may be had. Under this head comes a plea of misnomer. For example, a man by the name of John Amann was indicted by the name of John Ammon. It was held that he had a right to file a plea alleging that he was always known by his true name, and not by the name of Ammon (4).

§ 50. **Motions to quash.** A motion to quash applies to something which appears on the face of the indictment, or in the records. If by the records it appears that the

(3) Washburn's Judicial History of Mass., 142; 2 Chandler's Criminal Trials, 122.

(4) Amann v. People, 76 Ill. 188.

indictment was found by an illegally constituted grand jury, or was not endorsed, "A true bill," or if the indictment is defective in either form or substance, a motion to quash is in order. Motions to quash should be made and disposed of before a plea of not guilty is entered.

§ 51. **Demurrer to the indictment.** By a demurrer, the accused person calls upon the court to decide whether the matters charged in the indictment amount to a crime. This question is often raised by a motion to quash, which may be the safer method; for it was formerly held that a demurrer admitted the facts charged in the indictment, and that if it was overruled a sentence might be entered without a trial (5). In this country defendants are generally permitted to plead over, after the demurrer is overruled, except perhaps in case of misdemeanors.

§ 52. **Plea of former jeopardy: Autrefois acquit: Autrefois convict.** This plea is known by various names. It is to the effect that the accused had previously been put in jeopardy or tried for the same matter. At common law, there were two pleas of this nature, autrefois acquit, and autrefois convict (meaning formerly acquitted or convicted of the same crime).

The Constitution of the United States provides that no person shall be twice put in jeopardy for the same offense. Similar provisions are in the constitutions of the various states. If a person has been accused in such a manner as to sustain a conviction and put on trial, he is in jeopardy and cannot again be placed in jeopardy for

(5) 4 Bl. Com. 334.

the same matter unless a mistrial from necessity results. If the hearing is before a judge without a jury, jeopardy begins with the oath administered to the first witness. If the trial is by jury, jeopardy begins with swearing in a juror to try the case. Thus, if but one juror is sworn to try the case, the accused is placed in jeopardy, and if the case proceeds no further he is forever acquitted of that charge. However, where there has been a mistrial from necessity, such as the incapacity of the judge, the death of the judge, the necessary discharge of a juror, the serious illness of the defendant, or inability of the jury to agree, it is treated as no jeopardy. A plea of once in jeopardy is not good unless the previous prosecution was a valid one, but the fact that the prosecution was irregular in the first case is not enough to prevent the former jeopardy being a defense afterwards, if the former proceeding would sustain a conviction. In Mississippi a man was indicted for murder and found guilty of manslaughter. The supreme court held that, as a grand jury which found the indictment was illegally formed, the entire proceeding was void and that a new indictment for murder could be had (6). The defense is perfect although the acquittal was by order of the court erroneously made.

If the defendant asks that the jury be excused or after conviction asks for and obtains a new trial he thereby waives his privilege and may be again put on trial. Where one is indicted on several counts, or for one offense including others, it has been a matter of serious

(6) Kohlheimer v. State, 39 Miss. 548.

debate whether upon conviction of one of the offenses and acquittal of the rest, he could, after a new trial granted at his request, be put on trial for all of the offenses charged before. The majority of the courts hold that by asking for a new trial he has only waived the privilege as to the charge upon which he was convicted on the first trial.

§ 53. **The same offense.** In order to make this defense available, the second prosecution must be for the same offense as the first; and what constitutes the same offense is often a matter of considerable doubt. If crimes are so distinct that evidence of the one will not support the other, it is inconsistent with reason and repugnant to the rules of law to say that they are so far the same that an acquittal of the one will bar a prosecution for the other. Therefore the rule has come to be recognized that the test of identity is to ascertain whether the defendant might have been convicted on the first indictment by proof of the facts alleged in the second. The question is not whether the same facts are offered in proof to sustain the second indictment as were given in evidence on the trial of the first, but whether the facts are so combined and charged in the two indictments as to constitute the same offense. It is not sufficient to say, in support of a plea of autrefois acquit, that the transaction or facts on which the indictments are based are the same. It is necessary to go further and to ascertain whether they are so alleged in the two indictments as to constitute not only the same offense in degree or kind, but also that proof of the same facts offered to sustain the second indictment would have well supported the first.

In Illinois John Guedel was indicted for killing Adam Zimmerman by shooting him. The jury found a verdict of not guilty. Guedel was then indicted and convicted for killing the same man by striking him with a gun. The supreme court held the second conviction proper, for as the evidence necessary to sustain the second indictment would not have been proper under the first indictment, he was not placed twice in jeopardy for the same offense (7).

§ 54. **Plea of not guilty.** By a long-established practice, the plea of not guilty is regarded as a denial of every material allegation in the indictment. It is a denial of the venue, the act, and the intent. It makes an issue that covers the entire indictment, and requires the prosecution to make full proof, and that beyond all reasonable doubt. Under this plea the defendant may introduce evidence to show self-defense, insanity, or any other legitimate matter of defense. However, in several states statutes have been enacted, requiring insanity to be specially pleaded. It is a well established rule that, until a plea of not guilty is entered, there is no issue upon the merits of the case to try. If a trial is had without a plea, a verdict of guilty will not stand (8). So it is now provided by the statutes of various states that, if a defendant fails or refuses to plead, a plea of not guilty shall be entered in the records of the court by the clerk.

§ 55. **Bills of particulars.** Either before or after a plea of not guilty, the accused may move for a bill of particulars. A bill of particulars does not cure defects in an in-

(7) Guedel v. People, 43 Ill. 226.

(8) Aylesworth v. People, 76 Ill. 301.

dictment, but simply renders the charges more specific. If an indictment alleges that the accused, being the clerk of A, received from B a check for A and converted it to his own use, and if it appears that at various times, the accused had received from B similar checks, the court should require the prosecutor to file a bill of particulars, stating which check is in question. When a bill of particulars is filed the testimony must conform to its specifications, or the case fails.

§ 56. **Plea of guilty.** A plea of guilty is a solemn and unqualified admission of guilt, both as to the commission of the act and the intent charged. It should never be tendered or accepted as a matter of form. If a defendant, protesting his innocence, offers to plead guilty, the offer should be rejected. The law does not punish a man at his own request; it should only punish him when he is found guilty on the evidence, or when he unqualifiedly and in open court declares that he is in fact guilty. It occasionally occurs that the prisoner is mistaken as to the consequences of his wrongful act, or the light in which the law views it, or the nature of the indictment, and offers to plead guilty when in fact he is not guilty. Some years ago a prisoner by the name of Jersey was arraigned in court upon an indictment for murder. He pleaded guilty. The judge asked him a few questions, and then directed the clerk to enter a plea of not guilty. Upon the trial Jersey was found not guilty. It seems that he had nothing to do with the homicide, but had aided in disposing of the dead body. He was an accessory after the fact, but,

being a simple-minded man, had concluded that he was guilty under the indictment for murder.

In some places an irregular practice has grown up in felony cases, by which a plea of guilty is entered so that the judge may hear the evidence without a jury. In a felony case the law does not permit the judge to try the case without a jury, much less will it permit a trial upon a plea of guilty where the defendant as a matter of form attempts to confer a jurisdiction not recognized by law. When the trial is upon a plea of not guilty, the defendant retains his right to have a review in a higher court, but a plea of guilty, being a solemn admission of guilt placed upon the record, leaves him at the sole mercy of the judge.

§ 57. **Change of venue.** While it is the constitutional right of each person neither to be indicted nor tried in any county, other than the one in which the alleged crime is charged to have been committed, most of the states have statutes allowing to the defendant a change of venue if the people of the county are so prejudiced against him that he is not likely to have a fair trial. On a motion for change of venue both sides may file affidavits; but the motion should not be decided upon numbers, for many persons, who are themselves prejudiced against the accused, may swear that they believe he can have a fair trial. The facts set out in the affidavit are to determine the court's action, and if the facts show strong local prejudice against the accused the case should be sent to another county. Motions for change of venue are also in

order when the judge is prejudiced or otherwise disqualified.

§ 58. **Compulsory process for witnesses. Motions for continuance.** As a general rule witnesses in criminal cases are obliged to attend court without being paid their fees in advance. A defendant is entitled to have compulsory process to bring his witnesses to court. If he is diligent in his efforts to secure the attendance of his witnesses and fails for some reason not his own fault, he may move for a continuance by showing that an absent witness knows of material matters which cannot be fully proved by any other witness, and that he can procure the attendance of the absent witness at the next term of court.

CHAPTER V.

THE TRIAL.

§ 59. **Ancient methods of trial.** Like all other people in a similar stage of culture, the Anglo-Saxons practiced trial by ordeal, which continued for some time after the Norman conquest. These trials consisted in causing the accused to take into his hands red-hot iron, or plunge his naked arm in boiling water, or to be cast into a pond or river of cold water. If the hot iron or the hot water did not affect him, or if he swam without any effort, he was declared innocent, otherwise guilty (1). Other early modes of trial were by battle, and by wager of law (securing a certain number of persons to swear they believed the accused innocent). Even in the time of Blackstone there was in existence, though seldom resorted to, the trial by battle, which was fought with cudgels. Unless one of the parties was sooner vanquished, it continued from sunrise to star-peeping, when the accused was declared acquitted (2). This was not finally abolished in England until 1819. Happily, these methods have never had a place in American procedure.

§ 60. **Present methods.** Under our system of criminal procedure we have two methods of trial, trial by court,

(1) 4 Bl. Com. 340.
(2) 4 Bl. Com. 346.

and trial by jury. Trials without a jury are generally limited to charges of misdemeanors, while jury trials apply to all criminal cases. By either of these methods, the same class of evidence and certainty of proof is required. More latitude is sometimes allowed in a trial by a judge than in a trial by a jury. The judge may sometimes venture to listen to testimony which would be improper to go to a jury, for on account of his learning and experience, it is presumed that he will be able to reject it in forming his opinion; but he cannot control the minds of the jury, and should not allow any but legitimate testimony to be presented to them.

§ 61. **Trial by jury.** Trial by jury is a characteristic feature of English and American criminal procedure. Unlike other public officers who may be influenced by party prejudices or personal aspirations, jurors assume a humbler but more independent function. Not self-nominated, they are called to perform a public duty; their compensation is meagre, and their service often performed at a sacrifice; they have no rivals seeking to unseat them; they have neither desire nor opportunity to extend their terms of office; they are usually comparative strangers to each other and to the parties litigant; they form a tribunal likely to be actuated alone by desire to accomplish justice. Trial by jury is a long-tried and successful instance of direct participation by the people in the administration of justice.

§ 62. **Selection and swearing of jurors.** Of this we can take but a general view, for the practice is largely controlled by local statutes. The jurors drawn and called

into the box are sworn to answer questions as to their fitness. Each side may examine the drawn jurors as to their fitness in that particular case. Those who are closely connected, either with the prosecution or with the defense by interest or relationship, or have an abiding opinion on the question of guilt or innocence, may be challenged and excused for cause. In some jurisdictions jurors having conscientious scruples against capital punishment may be excused in capital cases. A limited number of peremptory challenges are allowed; that is, each side may excuse several of the jurors without giving any reason therefor.

In some jurisdictions, as soon as four jurors are found acceptable, they are sworn to try the case, and the examination continues by "fours," until the entire jury is accepted and sworn. In other jurisdictions, none are sworn, until twelve have passed the ordeal and are selected.

§ 63. **Opening statements.** When the jury is sworn to try the case, the prosecuting attorney may read the indictment to the jury and briefly state what he expects to prove; after which the counsel for the accused may state the features of the defense, or he may reserve his statement until the witnesses for the prosecution have testified. In the opening statements, counsel should not state anything of which he has not proof, or which the law will not permit to be proved; nor should he indulge in argument or declamation. An opening statement should be simply a clear recital of what counsel expects to prove. It is not evidence but is simply calling the attention of the

jury to the features of the case, so that they may better understand the evidence as it is introduced.

§ 64. **Separation and competency of witnesses.** At the request of either side, it is a usual custom that all witnesses are called and sworn, and then an order made for them to remain out of the room except when called to testify. A witness who remains in the room, contrary to the order, is not necessarily rejected, but may be punished for contempt of court. In both civil and criminal cases, a child of tender years is interrogated before he is sworn, and if he appears to have a sufficient knowledge of the nature of an oath he is usually permitted to testify. As a general rule, neither husband nor wife is permitted to be a witness for or against the other in a criminal case, except where the charge is, one of personal violence from the one to the other, in which case he or she may testify on either side. In some states this is regulated by statute.

§ 65. **Defendant as a witness.** At common law one accused of crime was not permitted to testify in his own behalf, but it is now generally provided by statute that the accused may so testify; but, if he remains silent, neither the judge nor the prosecuting attorney is permitted to call attention to that fact in the presence of the jury. If the verdict is guilty, a violation of this rule by either court or counsel may be grounds for a new trial. An accused cannot be compelled to testify against himself; nor can he be called upon in open court to produce any document or other thing which can be used in evidence in the case.

§ 66. **Order of proof. Motion for verdict. Jury ex-**

cluded. At the close of the opening statement or statements, the prosecution offers its testimony t sustain the indictment. The accused may then either submit the case without further evidence or offer proof. When the accused has closed his proof, the prosecution may offer evidence in rebuttal; but such evidence should be purely evidence in rebuttal, and not evidence that should have been introduced as its main proof, unless a valid excuse is given for such delay.

At the close of the prosecution's opening evidence and before any evidence is offered by the accused, the accused may move for a verdict of not guilty; but the court should overrule this motion, unless there is a clear failure of proof, for it is the province of the jury to weigh the testimony. When all the evidence on both sides of the case is in, the accused may renew this motion, and the duty of the court is practically the same as on the original motion.

It sometimes happens, during the course of a trial, that questions arise as to whether certain evidence should or should not be introduced, which would be so prejudicial that a mere suggestion of it might have its effect upon the jury. In such a case it is usual for the jury to retire to its room while the argument on the objection is being made.

§ 67. **Burden of proof. Presumption of innocence. Reasonable doubt. Grades of offenses.** As to the amount of evidence required, there is a marked difference between civil and criminal suits. In civil cases the rights of litigants are at issue, and the cases are decided upon

the comparative weight of the evidence. In criminal cases, the issue is not based on conflicting claims, but the question is whether the accused has done that for which a punishment should be inflicted. The law does not delight in punishing its subjects; accordingly it very justly and humanely declares, that no man should be convicted of crime unless proven guilty beyond all reasonable doubt. This rule is broad in its interpretation and clothes the accused with the presumption of innocence throughout the entire trial. The indictment is no evidence of guilt, nor does it raise any inference or presumption of guilt. It is simply the accusation on which the accused is being tried. This doctrine should be impressed on the minds of the jurors when they are being examined as to their fitness, so they may guard against forming hasty conclusions during the early stages of the trial. A juror should listen to all of the evidence and argument on each side and to the instructions of the court, and keep his mind free from any fixed and unalterable opinion until the case is submitted to the jury. Then it becomes the duty of the entire jury to consider the case, and answer the crucial question: Considering all of the testimony, in the light of the law, has the accused been proven guilty beyond all reasonable doubt?

The doctrine of reasonable doubt applies to the grade of the offense, as well as to the question of guilt. Thus, if the indictment is for assault with intent to commit robbery and the jurors are convinced by the evidence, beyond all reasonable doubt, that an unlawful assault has been committed, but entertain a reasonable doubt as to

the intent to rob, the verdict should be "guilty of assault," which is an acquittal of a higher grade of offense.

§ 68. **Reasonable doubt: Alibi.** In common parlance we hear of "proving an alibi." This is a misconception. The word "alibi" means "in another place." The prime issue in the case is whether the defendant was present and committed a crime as charged, and not whether he was at another place. Some courts have held that where the accused denies his presence, it devolves on him to prove that he was at another specific place; while other courts have held that it is sufficient if his proof "creates" a reasonable doubt. Both of these theories are wrong. It devolves on the prosecution to prove his presence. Any evidence that he may offer to the effect that he was absent from the place of the alleged crime is simply negative and rebutting testimony. The phrase "creating a reasonable doubt" is inaccurate. That which is self-existent cannot be created. The defendant is clothed with the presumption of innocence, of which a reasonable doubt is an essential element. The real inquiry is: After considering all the testimony on both sides, have the presence and the guilt of the accused been proven beyond all reasonable doubt (3)?

§ 69. **Corpus delicti.** The term "corpus delicti" means the body or fact of the crime, which must be clearly established. Thus, in a homicide case, not only must

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(3) On this subject see 11 Am. Cr. Rep. 31-88; 12 Am. Cr. Rep. 13-31; Johnson v. State, 21 Tex. Crim. Rep. 368; State v. Hamilton, 57 Iowa 596; Walters v. State, 39 Ohio St. 215.

the death be proven, but it must be shown that the death was produced by criminal means.

"I would never convict any person of murder or manslaughter," says Sir Mathew Hale (4), "unless the fact was proved to be done, or at least the body found dead." Continuing, he tells of a case where a man was convicted and executed for a supposed murder, when in fact the accused had compelled the supposed victim to go to sea, which was also a capital offense. Thus, although the accused was not guilty of murder, yet he dared not disclose his real defense. Within a year after his execution, the supposed dead man appeared alive.

Sir Edward Coke records a case in which an uncle was the guardian of an orphan niece and the custodian of her property. When chastising her, she cried out: "Oh good uncle, kill me not." She disappeared; and after some time he was arrested, admonished to produce her by the next assizes, and was bailed. He attempted to deceive the judge by producing another girl of like appearance. The fraud was detected, and he was tried, convicted, and executed. Several years afterwards she re-appeared alive. When chastised, she ran into an adjoining county and was enabled to find a home and earn a livelihood. On becoming of age, she returned to possess her property (5).

§ 70. **Same: Cannot be proved by confession.** By the better view a confession is an admission of guilt but is not proof of the act. It connects the accused with the

(4) 2 Hale's P. C. 290.

(5) 3 Coke's Inst. 332.

crime, but it is no proof of the crime. In Mississippi, the accused confessed that he had mixed poison and caused it to be given to the deceased. The proof showed that the death might have resulted from such poison, or from certain natural causes. The accused was convicted, but the supreme court of the state set the conviction aside, on the ground that death was not proven to be caused (6) by a crime. Some actual instances will show the wisdom of the rule. In 1660 John Perry confessed that he aided and counselled his mother and brother in killing William Harrison. The circumstances strongly corroborated his confession. The three Perrys were executed; but several years afterwards Mr. Harrison returned home alive. In Vermont, in 1819, Stephen Boorn, in a written confession, stated that on May 10th, 1813, he killed his brother-in-law Richard Colvin and disposed of the body. Boorn was sentenced to be executed, but through a newspaper report, Colvin was discovered in New Jersey and brought back in time to prevent the execution. In 1841 a man by the name of Fisher disappeared from Springfield, Illinois. Henry Trailor was arrested, and said that his brothers killed Fisher and that he saw the body. He was corroborated by circumstances, and, although it was reported that Fisher was found alive, Trailor told his story under oath at the preliminary examination. Abraham Lincoln defended, and the prisoners were discharged. Fisher in a few days returned alive.

(6) Pitts v. State, 43 Miss. 472.

§ 71. **Practice in regard to confessions.** As has been already noted, a confession is not proof of the commission of a crime, but simply points out the confessor as the criminal. Experience has demonstrated that truth is not the serf of force or fear, nor the child of struggling hope. Consequently, it is a well-established rule of law that a confession should not be received in evidence, unless it is first proven that it was not the result of any threat, force, or promise from a person in authority, or from one interested in the prosecution. When the prosecuting attorney offers to prove a confession, the judge should direct the jurors to retire to their room. Then it devolves upon the prosecution to prove that the confession is not tainted with force, threats, or promises. On this question evidence on both sides may be heard. It is not sufficient that a written confession recites that it was freely made, for that part, as well as the rest may be tainted. If it is true that the confession was freely and voluntarily made, evidence of it is then given to the jury; but the circumstances surrounding it must also be given in evidence, for, although the judge decides that the confession is proper to go to the jury, the jury must weigh it and it may be will find it unworthy of belief.

§ 72. **Conduct of the presiding judge.** While it is the duty of the judge to pass upon all questions relating to the admissibility of testimony, the order of the trial, and questions of law, in many states he is required to refrain from expressing any opinion on the weight of the evidence. The jurors are the judges of the weight of the testimony and of the credibility of the witnesses, and the

judge in such states must not by word, action, or implication convey to them his views on the merits of the case. In a homicide trial, the identity of an oil can came in question. The judge remarked: "I believe that is the same can." This was held a fatal error and a new trial was granted (7). In another case, the counsel for the defendant moved for a verdict of not guilty on the ground that there was no evidence to show guilt. The judge remarked in the presence of the jury: "Do you mean to say, sir, that there is no evidence here to show the guilt of the defendant? I say there is evidence." For this remark a new trial was granted (8).

The common law rule was contrary to this, and still prevails in England, the United States courts, and many state courts. The United States Supreme Court has stated the rule to be that a judge may express his opinion upon the facts, so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the jury (9).

§ 73. **Argument of counsel.** When the testimony on both sides has closed, the case is ready for argument. Usually the prosecution has the opening and the closing argument. In the opening, the theory of the prosecution, with a review of the principal points of the evidence, should be clearly presented; and in the closing argument, no new points should be presented. When a prosecuting attorney has made his opening, if the counsel for the ac-

(7) Marzen v. People, 173 Ill. 56.
(8) Feinberg v. People, 174 Ill. 617.
(9) Lovejoy v. U. S., 128 U. S. 171.

cused declines to speak, no further argument by the prosecution should be permitted; for it is to be presumed that a full presentation has been made in opening. It is usual to permit two attorneys to speak on behalf of the accused, sometimes more. If several persons are on trial, each is entitled to separate counsel throughout the trial, and each to at least one argument to the jury. In some jurisdictions the court may limit the time for argument, in others not. When the court has power to declare a time limit, that power should be exercised with a sound discretion, allowing sufficient time for a full presentation of the case.

§ 74. **Nature of argument.** The argument should be confined to the facts of the case. Counsel ought not to go outside of the evidence or express their personal belief on the question of guilt or innocence; for it is on the facts introduced in evidence that the jury should find its verdict, and not on the facts outside of the evidence, nor on beliefs or opinions of either court or counsel. However, matters of general knowledge, whether historical or local, may at times be subjects of comment, as well as philosophical reflections on human affairs in general.

Of late years, courts have drawn some very close lines and have set aside convictions because of improper argument on the part of public prosecutors. Making statements not connected with the evidence; using violent, intemperate and abusive language; stating personal beliefs on the question of guilt, and attempting to intimidate the jury by a display of official arrogance,—have all been considered sufficient reasons for the granting of a

new trial. In a Louisiana case (10), a conviction for murder was reversed, because the prosecutor in his argument said: "If there is a man on that jury who does not believe this man ought to be hung, then I say he is a weakling, not possessed of the proper manhood, and is unfit to sit on that jury." This decision was clearly right. As the representative of the people the prosecutor prepares and presents the case, but he has no right to attempt to intimidate the jurors, in the discharge of their function.

§ 75. **Instructions of the court.** It is usual for the presiding judge to instruct the jury as to the law therein contained. In some jurisdictions it is imperative. In some jurisdictions instructions must be in writing, in others they may be oral. They ought to cover all of the principal features of the case, stating the law applicable; and jurisdictions differ greatly as to whether the judge may express any opinion as to the weight of the evidence. See § 72 above. Where instructions in writing are required, counsel on each side generally prepare instructions and submit them to the judge. These he may give or refuse. Those which he refuses to give should be so marked and placed upon file. The better practice is not to use the instructions handed in by counsel but to formulate a logically arranged charge, in which the approved requests are covered in the language of the presiding judge. In the Federal courts the judge gives an oral charge, at the close of which he permits counsel to make

(10) State v. Blackman, 108 La. 121.

suggestions for further instructions; at which time the defendant's counsel is permitted to enter his exceptions to the charge.

§ 76. **Jury in charge of the case.** When the court has concluded its charge, it is usual to swear an officer to take the jury to some convenient place, and there keep them together without food or drink, water excepted, unless by order of court, until they have agreed upon a verdict; not to allow others to converse with them, nor to speak to them himself except to ask them whether they have agreed upon a verdict; and when they have so agreed, to bring them into court. The old practice was very rigorous; but more humane treatment is now given to the jurors. They are generally permitted to have their meals; and by a commendable practice in some places they are permitted to have sleeping accommodations. If, after being out a reasonable time, it appears that they cannot agree, they may be discharged. If they agree they are brought into court with their verdict.

§ 77. **Verdict.** As a general rule, a verdict which simply finds the defendant guilty is sufficient. When there are several charges in the indictment, for which the law prescribes different punishments, the verdict should be more specific. Thus, if the indictment charges the accused with committing burglary, and also with receiving stolen property, a verdict finding him guilty should state of which crime he is found guilty.

If the offense charged in the indictment contains several grades, the jury should specify of which grade the defendant is found guilty. Thus, on a well drawn indict-

ment for assault to commit murder, the verdict could be "guilty of assault with intent to commit murder," or of "assault with intent to do bodily injury," or of "common assault."

Where there are several distinct misdemeanors charged in separate counts of the indictment, the verdict should specify, by numbers, the particular counts on which the defendant is found guilty (11).

§ 78. **Sealed verdict.** For convenience jurors are sometimes permitted to seal their verdict and give it to the clerk to be read the next morning, or at the next opening of court; but the jurors should always be present when their verdict is read.

§ 79. **Polling the jurors.** When a verdict of guilty is returned, the accused may require each juror to be asked: "Was this, and is this now your verdict?" If any juror answers in the negative, the verdict cannot be entered.

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(11) Day v. People, 76 Ill. 380.

CHAPTER VI.

PROCEEDINGS SUBSEQUENT TO TRIAL.

Section 1. Proceedings in Trial Court.

§ 80. **After verdict.** When a verdict is entered, if the accused is on bail he may be committed, or left at large on his old bail, or he may be required to give new bail. He is usually given a reasonable time to enter a motion for a new trial or a motion in arrest of judgment.

§ 81. **Motion for new trial.** Motions for new trials are based on lack of evidence, errors in admitting or excluding testimony, prejudicial remarks of court or counsel, errors in selecting jurors, misconduct of jurors, newly discovered evidence, or any other matter affecting the rights of accused.

§ 82. **Motion in arrest of judgment.** By a motion in arrest of judgment the accused takes advantage of some insufficiency or irregularity appearing of record; such as, that the record shows that the grand jury was improperly selected or impanelled; or fails to show that the indictment was presented in open court; or that the indictment is insufficient in substance; or was not indorsed "A true bill." If the motion in arrest of judgment is sustained, the defendant is discharged, or he may be held for further action.

§ 83. **Sentence.** If the motion for a new trial and the motion in arrest of judgment are overruled, the court may immediately, or at a future time, enter the sentence. In felony cases the accused must be present, and he is usually asked whether he has anything further to say why the sentence should not be passed upon him. In misdemeanor cases, the sentence is often entered in the absence of the accused; but if the sentence or part of it is imprisonment, the court should require him to be present. Where two or more sentences are entered against the same person on separate indictments, or upon separate counts of the same indictment, the court should direct the order in which they are to be served; otherwise they will all run at the same time (1). In a capital sentence, the day on which it is to be executed should be stated.

At any time during the same term, the court may set aside or modify the sentence; but when the term of court has closed, the sentence cannot be changed by the court that entered it. However, it may be subject to a judicial reprieve.

§ 84. **Judicial reprieves.** At common law any judge who had power to enter a sentence for a felony, had power to grant a respite or reprieve. In the reign of Queen Elizabeth it was asked of the judges at Westminster, whether a sentence of death which had been respited by the judges of assizes for six weeks, could be further respited by the same judges; the assizes having in the meantime adjourned. It was answered by all the

(1) People v. Whitson, 74 Ill. 20.

judges, that a further respite could be granted, and that such was always the law of the realm (2).

In 1828 Judge Ogden Edwards of New York, because of newly discovered evidence, granted a reprieve to a man about to be hanged. This action of the judge very much annoyed Governor DeWitt Clinton, who wrote to the judge, informing him that the power to pardon or to reprieve was by the constitution vested in the executive and not in the judicial branch of the government. As Governor Clinton died within a few days after writing the letter, Judge Edwards directed his answer to the lieutenant-governor, in which he very ably defended his position, showing that the power to reprieve had always been a judicial function, which was not destroyed by the constitutional provision vesting the same power in the governor (3). The supreme court of West Virginia has unqualifiedly taken this stand (4), while the New York court of appeals attempts to draw a line between reprieves and suspension of sentences (5).

The term "suspension of sentence" probably had its origin in American cases where such action was unnecessary, but the presiding judges were not aware of their common law inherent right to reprieve. Were it not for the right vested in judges to grant reprieves, great injustice at times might be done; for, in the shadow of the gallows, uncontrovertible proof of innocence may appear.

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(2) 2 Dyer, 205; 2 Hale's P. C. 412.

(3) Miller's Case, 9 Cowen, 730.

(4) State v. Hawk, 47 W. Va. 434.

(5) People v. Court of Sessions, 141 N. Y. 288.

A reprieve, respite, or suspension of sentence should always be for a definite time; after which the sentence revives with its original force, unless it is again arrested by some legal method.

Section 2. Appellate Proceedings.

§ 85. Writs of error. Appeals. The usual method of obtaining a review of a criminal case is by a writ of error; but in some jurisdictions appeals are allowed. The ordinary way to obtain a writ of error is to obtain a transcript of the record, and, after endorsing upon it the assignment of errors or points relied on, to file the same with the higher court, praying for a writ of error, which will then issue to the lower courts together with a scire facias to the prosecuting attorney, calling on him to answer to the writ. The higher court may grant a supersedeas staying the execution of the sentence, and sometimes allows bail during the appellate proceedings. In the federal courts, the application for a writ of error is filed in the trial court, and the writ may either be granted by the trial judge or by the judge of the higher court. After the writ is served, the clerk sends up the transcript of the record.

An appeal is prayed in the lower courts, where the preliminaries are usually arranged, and a transcript of the record sent to the higher court.

§ 86. Record. Bills of exception. In the court below the clerk keeps a record of the general proceedings, which must contain: The drawing and impaneling of the grand jury; the presentment of the indictment; a copy of the

indictment; the capias and its return; the matter of bail; the arraignment; the motion to quash; the plea; each continuance; the calling of the case for trial; the swearing of the jury; the daily proceedings of the trial; the verdict; brief entries of the motion for new trial, and motion in arrest of judgment, and the sentence. The clerk does not keep any record of the minute details; so motions for continuance or for change of venue, challenges to jurors, testimony of witnesses, the instructions of the court, and the various rulings throughout the case, must be preserved by a bill of exceptions, which when certified to by the judge, is filed and becomes a part of the record. This should be filed during the term at which the ruling was entered; unless more time be allowed, which is usually given.

§ 87. **Abstracts.** The party who has sued out the writ of error or takes the appeal prepares the synopsis of the record, which is printed and filed as the abstract of the case. If the opposing party is not satisfied with the abstract, he may prepare an additional one.

§ 88. **Briefs and arguments.** Each party may prepare briefs which set out the main features of the case, the points of law applicable, and arguments thereon. At the hearing of the writ of error or appeal, oral arguments may be had; but these arguments should be confined to the points made in the briefs.

§ 89. **Action of the court.** If, upon considering the entire matter, the judges conclude that the case is without material error, the order is that the judgment of the court below be affirmed. If the judges conclude that there

is material error, the order may simply be that the judgment is reversed, which finally ends the matter, or it may be reversed and remanded, which means that the case is sent back for further proceedings in the court below. It is usual for one of the judges to write the opinion of the court. From this opinion one or more of the judges may dissent, putting their views in writing upon the record. These opinions are usually printed in a bound volume of reports.

§ 90. Re-hearing. After the opinion is filed, the unsuccessful party is permitted to file a petition for a rehearing, calling the attention of the court to matter which may have been misunderstood or over-looked; but the petition should not contain a lengthy argument. If a rehearing is granted, the case is again opened for further briefs and argument.

§ 91. Pardon, commutation, and reprieve. The final appeal in criminal cases is to the President in federal cases or to the governor in state cases. A pardon is sometimes termed an "act of grace;" but cases often occur where it is an act of justice as a matter of right. This was so in the case of the two Boornes, one of whom was in the penitentiary and the other under sentence of death for the supposed murder of their brother-in-law, who reappeared alive. The pardons there were not acts of grace, but were granted as absolute matters of right.

The governor or president may either give a pardon, or may commute the sentence to a less punishment, or, as a temporary relief, may grant a reprieve until the matter is more fully investigated.

SALES OF PERSONAL PROPERTY

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§ 1. **Introduction. The Sales Act.** The principles of the law of sales are technical and can best be presented in the form of specific rules. Commissioners for uniform state laws have been appointed by nearly every state in the Union for the purpose of bringing about, so far as possible, uniformity of law in the United States, and the adoption of those rules of law most in accord with what may be considered the general law in America and that which is best adapted to our commercial interests. The Negotiable Instruments Law, the work of these Commissioners, has now (1909) been enacted by thirty-

eight states and territories. The Sales Act, drafted at the instance and under the supervision of these Commissioners, was adopted at the meeting of the conference at St. Paul in 1906, and recommended for passage. It has so far (1917) been enacted in Alaska, Arizona, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Wisconsin. It is probable that it will be enacted by a majority of the states within a few years. It *is chiefly a codification of existing law.*

This article will follow the classification of the Sales Act, and the principles of the law of sales will be stated in the language of that Act, with such explanations and illustrations as seem advisable and as space permits. The captions of the chapters and many of the sub-sections of this article are taken from the statute as passed in Rhode Island.

CHAPTER I.

FORMATION OF THE CONTRACT.

§ 2. Contracts to sell and sales. "A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price" (1).

It is important at the outset to understand the distinction between a contract to sell and a sale, a distinction that must always be kept in mind, in studying the subject of the law of sales. A contract to sell transfers no interest in the property which is the subject of the sale, but gives only a right in personam against the other contracting party. A sale transfers the property in the goods to the buyer. It produces a right in rem, a right in the property, good against all the world. The distinction is sometimes expressed as one between an executory and an executed contract of sale. "A contract to sell, that is, in future, is no more a sale than a contract to marry is a marriage" (2). If, according to the contract, the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, there is a *contract to sell;* but if the trans-

(1) Sales Act, sec. 1.

(2) Gillette, J., in Still v. Cannon, 13 Okl., 491.

fer of the property in the goods is to take place at the time of the transaction, there is a *sale*. If this distinction is kept constantly in mind, the principles of the law of sales and the cases will be easily understood. The term "contract of sale" is ambiguous and includes both a contract to sell and a sale.

§ 3. **Contracts of sale are simple contracts.** A sale being a contract, all the elementary principles of the law of contracts are applicable to a contract of sale, whether it be a contract to sell or a sale. There must be offer and acceptance, mutual assent, consideration, and freedom from misrepresentation, fraud, duress, undue influence, and illegality, to the same extent as in any other contract. All of these matters are fully discussed in the article on Contracts of Volume I of this work.

A transfer of property by operation of law is not a sale. For example, where a defendant pays a judgment in trespass, trover, or detinue, for the full value of the plaintiff's goods and the title to the goods passes to the defendant; or where one who has been wrongfully dispossessed of his goods waives the tort and recovers the value of the goods on the theory of a fictitious sale, the election of the plaintiff to waive the tort, in effect making the wrongdoer the rightful owner of the goods—these are not sales.

§ 4. **Absolute and conditional contracts to sell and sales. Conditions precedent.** "A contract to sell or a sale may be absolute or conditional" (3).

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(3) Sales Act, sec. 1.

In a contract to sell or in a sale there may be expressed or implied conditions, the most common being that the property (title) shall not pass until the price is paid. The goods are delivered to the buyer, but the property in the goods is retained by the seller until they are paid for. The condition may be a condition precedent or a condition subsequent. If it be a condition precedent, the condition must be performed before the property in the goods passes to the buyer; e. g., the delivery of goods to the buyer on condition that title shall remain in the seller until the price is fully paid. Often there is a contract of sale of specific goods to which something remains to be done. When anything remains to be done to the goods, by the seller, for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, the doing of such thing is a condition precedent to the transfer of the property, although the goods are ascertained and are in a state in which they ought to be accepted, unless it is clear that the parties intend that the property in the goods shall pass at once.

§ 5. **Conditions subsequent.** If it be a condition subsequent, the property in the goods has already passed to the buyer, but subject to being divested on the performance of the condition; e. g., a sale and delivery of goods to the buyer on condition that they may be returned within a certain time and the money refunded, if the buyer decides not to keep them. The performance of the condition subsequent here revests the title at once in the seller, irrespective of his consent at that time (4). Goods

(4) Gay v. Dare, 103 Cal. 454.

are often sold subject to the condition that they be not sold again except at a certain price, or except to certain persons designated by the vendor; or, as it has been expressed, "offered for sale on condition that the same are not licensed for sale and use until a certain sum is bona fide paid therefor," or that "discounts off a certain price will vitiate the right of use and render the persons concerned in such transactions liable to suit." Whatever may be the contract rights and liabilities between the vendor and vendee, in the case of a breach of such a collateral agreement as to the use or sale of the goods sold, the vendor has no property rights in the goods and cannot follow them into the hands of a purchaser (even with notice) from his vendee in violation of the restrictive agreement (5).

§ 6. **Sales between part owners.** "There may be a contract to sell or a sale between one part owner and another" (6).

That is, one joint owner of goods may sell his interest therein to another joint owner or to a third person. Where the purchaser is already a joint owner, he is acquiring the interest of others in the goods; or, as in the case of a judgment debtor buying his own goods, though there be in that case no transfer of title, the vendor transfers to the purchaser his entire property rights in the goods.

§ 7. **Capacity: Married women, infants, insane persons, and drunkards.** "Capacity to buy and sell is regu-

(5) Park & Sons Co. v. Hartman, 153 Fed., 24, 39.

(6) Sales Act, sec. 1.

lated by the general law concerning capacity to contract and to transfer and acquire property'' (7).

It has been stated above (§ 3) that as a sale or a contract to sell is an ordinary contract, all the fundamental principles of the law of contracts are applicable to contracts of sale. The same rules and limitations in respect to the parties capable of entering into any simple contract are applicable to a contract of sale. At common law, the purchases and sales of a married woman were generally absolutely void. She might purchase necessaries as the implied agent of her husband and bind him for the price, but she could not make herself personally liable, even upon a purchase of necessaries. Under the modern statutes in every state, a married woman may make purchases and sales the same as if she were unmarried, and in several states she may contract directly with her husband, thus allowing sales of personal property directly between a husband and wife. The capacity of married women to make contracts is fully discussed in Part II of the article on Domestic Relations and Persons, in Volume II of this work.

The purchases and sales of an infant, i. e., a person who has not yet reached his legal majority, generally twenty-one years of age, are not absolutely void, but voidable only. Contracts of sale entered into by an infant, whether he be the buyer or the seller, are voidable at his election, and cannot be enforced against him, against his will, except for necessaries. The subject of infants' con-

(7) Sales Act, sec. 2.

tracts is fully treated in Part IV of the article on Domestic Relations and Persons, in Volume II of this work.

As a general rule, the contracts of an insane person are voidable, although they are held in some states to be absolutely void. When the insanity is unknown to the other contracting party, and no advantage is taken of the insane person, insanity is usually not a defense to an action upon the contract, where the contract has been wholly or partly executed and the parties can not be restored to their original positions. The subject of insane persons' contracts is treated in the article on Contracts, §§68-72, in Volume I of this work.

Purchases and sales made by a person while under the influence of liquor are voidable, if the degree of intoxication is such as to render the person incapable of understanding the nature of the transaction into which he has entered. They may be avoided within a reasonable time after becoming sober, or may be ratified. The subject is further treated in the article on Contracts, §73, in Volume I of this work.

For the effect of the Sales Act upon the doctrine of this subsection, see §76, below.

§8. **Liability for necessaries.** "Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition of life of such infant or other person, and to

his actual requirements at the time of delivery'' (8).

The liability of an infant to pay for necessaries is not a liability upon the contract into which he has entered and under which the goods have been sold to him, but his liability is quasi-contractual, which means that he is liable as upon a contract implied in law for the value of the necessaries, i. e., to the extent that he has been benefited by what he has received. The price agreed upon in the transaction is not taken as the measure of the infant's liability, but, at the most, is only evidence of the value of the goods received. In case the infant has driven a good bargain and the price is less than the real value of the goods, he may exercise his option to stand by his contract. The adult with whom the infant contracts is always bound by the contract, if the infant so elects, whether the subject matter of the contract be necessaries or not.

§ 9. **What are necessaries?** Whether, in any case, the goods are necessaries or not is a question to be determined according to the circumstances of the individual case. The question to be determined is: are the goods suitable to the condition in life of such infant and to his actual requirements at the time he receives the goods? A saddle horse might be considered a necessary for the son of a nobleman, where horseback riding has been prescribed by his physician, while a cheap set of golf sticks would perhaps be considered a luxury for the son of a peasant, even though he were told by the doctor to

(8) Sales Act, sec. 2.

get all the outdoor exercise he could and golf playing were thought to be the best kind. If the infant is already supplied with a sufficient number of the articles purchased, any additional articles of the same sort cannot be regarded as necessaries, and he cannot be held liable for their purchase price or value. In any event, he can be held liable only for an amount sufficient for his immediate needs. While an infant can become bound for the value of necessaries purchased by him, he cannot be held liable in any way upon a contract to purchase them. Where an infant purchases necessaries and the delivery is to be made in installments, he can become liable only for the goods actually received by him, and not for later installments after he has declined to receive any more goods. All of these matters and others connected with them, such as the infant's liability for misrepresenting his age, and the adjustment of rights where the infant repudiates his contract, are dealt with in Part IV of the article on Domestic Relations and Persons, in Volume II of this work.

An insane person is liable for necessaries; and, as in the case of the infant's liability for necessaries, the nature of the liability is quasi-contractual, and the same rules apply as to what may be considered to be necessaries (9). A person is liable for necessaries purchased while intoxicated, to the same extent and upon the same principles as in the case of an insane person (10).

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(9) Larue v. Gilkyson, 10 Pa. St., 375; Sceva v. True, 53 N. H., 627.

(10) Van Horn v. Hann, 39 N. J. Law, 207.

CHAPTER II.

FORMALITIES OF THE CONTRACT.

§ 10. Form of contract or sale. "Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties" (1).

A contract to sell or a sale may be either written or oral, so long as the contract, as a contract, is validly formed. Where the contract is in writing, it must be proved by the writing, and the evidence furnished by the writing cannot be varied by parol, under the so-called "parol evidence rule." See the article on Evidence in Volume XI of this work.

§ 11. The statute of frauds. The seventeenth section of the statute, 29 Charles II, c. 3, enacted in the year 1676, and entitled "An act for the prevention of frauds and perjuries," was as follows: "And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June (1677) no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of

(1) Sales Act, sec. 3.

the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The object of the statute, as its name implied, was to prevent frauds and perjuries by requiring that contracts of certain kinds—in contracts of sale those above a certain amount—should be evidenced by writing, signed by the parties to be charged, and not proven by the mere statements of witnesses depending upon their memories, and open to temptations to commit fraud and perjury. Statutes, the general effects of which are the same as this English statute, have been enacted in all the states in the Union except Rhode Island, Pennsylvania, Delaware, Virginia, West Virginia, North Carolina, Alabama, Louisiana, Texas, Kentucky, Tennessee, Ohio, Illinois, Kansas, New Mexico and Arizona.

§ 12. **Same: Sales Act.** The general effect of the provision of the Sales Act is the same, although the wording is somewhat changed. The provision is as follows: "Statute of Frauds. 1. A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be

signed by the party to be charged or his agent in that behalf. 2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply. 3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods" (2).

§ 13. **"Contracts for the sale of."** One of the first questions which arose under the statute, 29 Charles II, c. 3, s. 17, was whether it embraced both executory and executed contracts. The question was settled by the passage of Lord Tenterden's act, in 1828, which extended the statute to agreements to sell (3). In the United States, the language of the statute of frauds was construed to include executory as well as executed sales, and this even before the passage of Lord Tenterden's act in England, which has never been enacted in this country. The language of the Sales Act, "A contract to sell or a sale"

(2) Sales Act, sec. 4.

(3) 9 Geo. IV., c. 14, s. 7.

(§ 12, above), is clear, including executory as well as executed sales.

§ 14. Sales and contracts for work and labor: English rule. A contract for work and labor is not within the statute of frauds; that is, it is not necessary that it be in writing in order to be valid. It is often a close question whether a contract is a contract of sale or a contract for work and labor. Conflicting rules were adopted by the earlier English cases, but a decision which seems to be the present English doctrine was rendered in 1861, in the case of Lee v. Griffin (4). The plaintiff, in pursuance of an order from one Frances P., made two sets of artificial teeth, for the price of £21, after he had prepared a model of her mouth. As soon as they were ready, he wrote her a letter requesting her to appoint a day when he could fit them. She replied by letter, saying: "My health will prevent my taking advantage of the early day. I fear I may not be able for some days." Shortly after writing this letter, she died. The plaintiff brought suit against her executor. It was held that the contract was one for the sale of goods, and hence that the plaintiff could not recover, as there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing in accordance with the provision of the statute of frauds. Blackburn's rule, as there stated, is: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the

(4) 1 Best & Smith, 272.

contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." Probably the only state in the Union which follows the English rule is Missouri (5).

§ 15. **Same: Massachusetts rule.** Generally in the United States, one or the other of two rules is followed, viz., what may be called the Massachusetts and the New York rules. Under the Massachusetts rule, a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute.

In Goddard v. Binney (6) the plaintiff was a carriage manufacturer; the defendant came to his place of business and directed him to make a buggy for the defendant; the defendant gave directions as to the color of the lining, the material of the seat, and the painting, and also that the buggy was to have on it the defendant's monogram and initials; the price was agreed upon as $675, and the buggy was to be done in about four months. The plaintiff built the buggy in accordance with the order, and notified the defendant that it was completed. About

(5) Pratt v. Miller, 109 Mo., 78. But see Brown v. Sanborn, 21 Minn., 402.

(6) 115 Mass. 450.

two months after it was finished, the buggy was destroyed by a fire which consumed the plaintiff's factory and contents. In an action against the defendant for the price of the buggy, it was held that the defendant was liable; that the contract was one to which the statute of frauds did not apply, in accordance with the rule above stated; that enough had been done, in a case not within the statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession. The case followed the earlier Massachusetts case of Mixer v. Howarth (7).

The Massachusetts rule is followed in New England (except in Vermont, where the rule seems unsettled), New Jersey, Alabama, Georgia, Michigan, Indiana, Wisconsin, Minnesota, Wyoming, New Mexico, Washington, and California. The provision in the Sales Act is framed in accordance with this rule.

§ 16. **Same: New York rule.** Under the New York rule, as laid down in Parsons v. Loucks (8), which is followed in Maryland, North Carolina, South Carolina, and Oregon, "a distinction is drawn between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold or a payment of the purchase price. The latter is not." The agreement in that case, was to

(7) 21 Pickering, 205.

(8) 48 N. Y. 17.

manufacture at the defendants' own mills, and deliver at a specified price, 20,000 pounds of paper of specified sizes, no part of which was in existence at the time of making the contract, but was yet to be brought into existence by the labor and science of the defendants. It was there held, in an action to recover damages for an alleged breach of the contract to manufacture and deliver the paper, that the statute of frauds did not apply to the contract.

The New York rule is, that "an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word 'sale.' There must be a sale at the time the contract is made. The contrast between Parsons v. Loucks and Lee v. Griffin is, that in the former case, the word 'sale' refers to the time of entering into the contract, while in the latter, reference is had to the time of the delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule" (9). And yet, in that case, it was held that an order for certain quantities of lumber, which needed to be dressed and cut up into different sizes desired, the order being complied with and the lumber placed as ordered upon the plaintiff's dock, where it was burned, was within the statute of frauds. There were here no new

(9) Dwight, C., in Cooke v. Millard, 65 N. Y. 352.

products, but there was simply to be gone through with a process of dividing and adapting existing materials to the plaintiff's use. The real test in the New York rule is the existence or non-existence of the chattel at the time the contract is made. If the chattel is not in existence at the time that the contract is made, it is a contract for work and labor, and not a sale. If the chattel is in existence, then it is a sale.

§ 17. "Goods, wares, and merchandises." The three words were used in the English statute and are used in most of the American statutes, but the single term "goods," as used alone in the Sales Act, as defined in the Act itself, sec. 76 (§ 19, below), is sufficient. It is often difficult to determine just what constitutes "goods." An important distinction is between real and personal property. While under the fourth section of the statute of frauds, it is provided that no "action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized," it is often necessary to determine into which class of property the subject of the contract falls. Under the fourth section, the contract must be in writing whatever the value of the land or interest therein, whereas the seventeenth section does not affect contracts for the sale of goods where the price is less than ten pounds sterling. The only manner of satisfying the statute under the fourth section is by a writing, while the

seventeenth section may be satisfied not only by a writing, but also by an acceptance and receipt of part of the goods so sold, or by the giving of something in earnest to bind the bargain or in part payment.

§ 18. **Growing crops and timber. Fructus industriales and fructus naturales.** A distinction is made between fructus industriales, crops planted and raised annually by the hand of man, and fructus naturales, crops or timber growing upon the land as natural products, though often transplanted or cultivated. A sale of growing crops which must be planted annually, fructus industriales, is everywhere held to be within the seventeenth section of the statute, as a sale of personal property (10). There is not the same uniformity in respect to the natural products of the soil, fructus naturales. It is generally held that if, by the terms of the contract, they are to be severed from the soil within a reasonable time, they are to be considered personal property, and hence goods, within the seventeenth section of the statute; while, if they are to remain affixed to the soil they are to be considered as an interest in land, within the fourth section.

In regard to sales of growing or standing timber, there are conflicting rules in the American decisions. "The courts of most of the American states, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in land, and within the fourth section of the

(10) Evans v. Roberts, 5 B. & C., 829.

statute of frauds'' (11). In Green v. Armstrong (12) it was held that an agreement for the sale of growing trees, with the right to enter on the land at a future time and remove them, was a contract for the sale of an interest in land. It was there said: ''Where the subject matter of a contract of sale is growing trees, fruit, or grass, the natural produce of the earth, and not annual productions raised by manurance and the industry of man, as they are parcel of the land itself, and not chattels, the contract, in order to be valid, must be in writing'' (i. e., under the section of the New York statute declaring that every contract for the sale of any interest in lands shall be void unless in writing). The parties here intended that the property in the trees should pass before they were severed from the soil. In Smith v. Surman (13) an action was brought to recover the value of a quantity of ash timber, at a certain price per foot, the contract having been made at the time the trees were being felled. It was held to be a sale of personal chattels, and the rule was stated that ''where the contracting parties contemplate a sale of goods, although the subject matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller's bestowing work and labor on his own raw materials: that is a case within the statute'' (i. e., relating to goods, wares and merchandise).

Where the vendor refuses to comply with the agree-

(11) Hirth v. Graham, 50 Ohio State, 57.
(12) 1 Denio (N. Y.), 552.
(13) 9 B. & C., 561.

ment, either to sever the trees from the soil himself or to allow the purchaser to do so, authorities differ as to whether the vendor is responsible in damages. The Massachusetts court (14) held that he was liable, but the New York court (15) held the opposite. A contract for the sale of minerals still in the ground, and fixtures is governed by the same principles as a contract for a sale of fructus naturales.

§ 19. Miscellaneous property. Choses in action. Sales Act. Buildings erected upon leased land, with no intent that they shall become a part of the realty, are personal property and may be removed or sold by the tenant, as personal property. Water, separated or to be separated from a stream or lake, and ice are personal property (16).

In England, a contract for the sale of shares of stock in a joint stock company is not a contract for the sale of goods, wares or merchandises, within the statute (17), but in this country the rule is generally otherwise (18). Bonds and mortgages and bills and notes have been held to be within the statute. The Sales Act expressly includes all choses in action. In Greenwood v. Law (19) it was said that the term "goods, wares, and merchandise" is equivalent to the term "personal property." A

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(14) Whitmarsh v. Walker, 1 Metcalf, 313.

(15) Green v. Armstrong, 1 Denio, 552.

(16) Jersey City v. Harrison, 72 N. J. Law, 185; Higgins v. Kusterer, 41 Mich., 318.

(17) Humble v. Mitchell, 11 A. & E., 205.

(18) Trisdale v. Harris, 20 Pickering, 9.

(19) 55 N. J. Law, 168; Hudson v. Weir, 29 Ala., 294; Somerby v. Buntin, 118 Mass., 279. Contra, Vawter v. Griffin, 40 Ind., 593.

sale by a partner of his interest in the firm need not be in writing (20). An agreement to form a mercantile partnership is valid when made by parol.

The definition of "goods," in the Sales Act, is as follows: " 'Goods' include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale" (21).

§ 20. **"For the price of fifty dollars (ten pounds sterling) or upwards."** The word "price" in the English statute has been adopted in all the statutes of frauds in this country, but it has been construed as the equivalent of "value;" so contracts of exchange or barter have been held to be within the statute. In the Sales Act, the word "value" is used. The amount, however, though generally fifty dollars, about the equivalent of the amount in the English statute, varies from thirty to two hundred dollars. In Florida no limit is fixed. The purchasing value of fifty dollars (ten pounds) has greatly diminished since the English statute of frauds was passed, over two hundred years ago. Five hundred dollars is the amount fixed by the Sales Act, and that is the amount fixed in the act as passed in Arizona, New Jersey, Massachusetts and Rhode Island. In Connecticut the amount has been fixed at one hundred dollars, and in Ohio at twenty-five hundred. It is not likely that the amount adopted will ever become uniform in the several states.

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(20) Victor v. Vieths, 60 Mo. App., 9

(21) Sales Act, sec. 76.

Where several articles are bought under one contract, the price of each article being less than the limit fixed by the statute, but the total sum being greater, the contract is within the statute (22). So also where the price of the goods is above the limit fixed and the contract includes an undertaking to do or furnish something else, as a sale of a mare and foal with an agreement that the vendor will keep the mare and foal and also another mare and foal belonging to the purchaser for a certain length of time. This is within the statute, and the vendor has no action upon the contract if it is not in writing. He may, however, recover for the keep of the purchaser's mare and foal (23). It may be that the value or price of the goods is not known at the time the contract is entered into, but is to be determined by the weight or measure of the goods. If the price, when ascertained, is found to be above the limit fixed, the contract is within the statute, and not valid if not in writing (24). Where sundry articles are purchased at the same time, though for a separate price for each article, the sale is to be regarded as one entire contract for all and not a several contract for each article (25). Where goods were ordered at one time, some of which were manufactured, and others not, it was held that the contract was entire for all the goods, and that the delivery and acceptance of the manu-

(22) Baldey v. Parker, 2 B. & C., 37; Allard v. Greasert, 61 N. Y., 1.
(23) Harman v. Reeve, 25 L. J. Rep., C. P., 257.
(24) Watts v. Friend, 10 B. & C., 446.
(25) Gault v. Brown, 48 N. H., 183.

factured articles took the case out of the statute as to all (26).

§ 21. **"Shall be allowed to be good."** Instead of the words, "No contract . . . shall be allowed to be good," used in the English statute of frauds, the words of the Sales Act are, "A contract . . . shall not be enforceable by action unless," etc. The meaning of the words used in the English statute, as construed by the courts, was the same as the words of the Sales Act. The language of the statutes in the different states varies. Only one or two states adopted the words of the English statute. Such expressions as, "shall be good;" that only a contract which complies with the terms of the statute "is valid;" or that one that does not so comply "is invalid;" or "shall be binding on the parties;" or "binding on the promisor;" or that "no evidence is competent unless it be in writing;" are found in the different state statutes. The legal effect of all these expressions is the same as that of the words of the English statute.

Under these statutes a contract made by parol is a valid contract, though not enforceable. The statute affects only the remedy, as between the parties, and not the validity of the contract itself. In Amsinck v. American Insurance Company (27) it was held that one who had only an oral contract for the purchase of a vessel had an insurable interest in the vessel. The court said: "But the oral contract to purchase was not void or illegal by

(26) Scott v. Eastern Counties Railway Co., 12 M. & W., 33.
(27) 129 Mass., 185.

reason of the statute of frauds. Indeed, the statute presupposes an existing lawful contract; it affects the remedy only as between the parties, and not the validity of the contract itself; and where the contract has actually been performed, even as between the parties themselves, it stands unaffected by the statute. It is, therefore, to be treated as a valid subsisting contract when it comes in question between other parties for purposes other than a recovery upon it." The defense of the statute, then, is purely a personal one, and cannot be made by strangers to the contract. In Maddison v. Alderson (28) Lord Blackburn said: "I think it is now finally settled that the true construction of the statute of frauds, both the fourth and the seventeenth sections, is not to render the contracts within them void, still less illegal, but it is to render the kind of evidence required indispensable when it is sought to enforce the contract."

The words, "shall be void" or "are void" are used in the statutes of several states. It would seem that such words should receive an entirely different construction from the words of the English statute, or similar words which are found in the American statutes; but that does not appear to be the case. It is generally held that these words are to be taken in the sense of "voidable" and as meaning the same as the words of the English statute (29).

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(28) 8 App. Cas., 467, 468.

(29) Crane v. Powell, 139 N. Y., 379.

§ 22. **"Except the buyer shall accept part of the goods so sold, and actually receive the same:" Acceptance.** There must be both an acceptance and an actual receipt of the goods by the buyer, or by his authorized agent. Either may precede the other, but both must exist in order to satisfy the statute.

An acceptance is an assent by the buyer, either before or after delivery, to becoming the owner of those specific goods (§ 12, clause 3, above). It must be absolute and not conditional. A mere delivery of the goods, or a part of the goods, is not sufficient. In Hunt v. Hecht (30) the defendant orally agreed to purchase a quantity of bones, directing them to be sent to a certain wharf, and giving a notice to the wharfinger to receive them. The bones were delivered at the wharf and received by the wharfinger. The defendant next day examined them and refused to receive them on the ground that they were not of the quality bargained for. It was held that there was here no sufficient evidence of acceptance and receipt. There may have been a receipt by the wharfinger, as agent of the purchaser, but there was here no sufficient acceptance to satisfy the statute.

A delivery of goods to a common carrier does not constitute an acceptance of the goods by the purchaser, unless the carrier has authority from the purchaser to accept the goods. Where, however, the requirement of the statute is that part of the goods be "delivered," a delivery of the goods sold, to the carrier in the usual course of transportation has been held to satisfy the

(30) 8 Exch., 814.

statute (31). The question whether or not there has been an acceptance is one of fact, to be determined by the jury, upon all the evidence, including the circumstances of the case. An acceptance may be indicated by the conduct of the purchaser, as when he does an act which would be justified only if he was the owner of the goods. Detention of the goods for an unreasonable time by the purchaser is evidence of an acceptance by him (32).

§ 23. **Same: Receipt.** Actual receipt means the acquisition of possession by the buyer or his agent. A number of states hold that to constitute such actual receipt there must be something more than mere words. In Shindler v. Houston (33) the plaintiff was the owner of a quantity of maple plank and scantling. The plaintiff and defendant met at the place where it lay, and the plaintiff said to the defendant, "What will you give for the plank?" The defendant said he would give three cents a foot. The plaintiff then asked, "What will you give for the scantling?" The defendant replied, "One and a half cents a foot." The plaintiff then said, "The lumber is yours." The defendant then told the plaintiff to get the inspector's bill of it and carry it to Mr. House, who would pay it. It was held that this did not constitute an acceptance and receipt of the lumber. "There must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the

(31) Bullock v. Tschergi, 13 Fed., 345. Contra, Legett & Meyer Co. v Collier, 89 Iowa, 144.

(32) Parker v. Wallis, 5 E. & B., 21.

(33) 1 Comstock (N. Y.), 261.

price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold."

Where the goods are ponderous and incapable of being handed from one to another, as a stack of hay, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property (34). Where sugar in a royal warehouse, which could not be removed until the duties were paid, was sold at auction, and half-pound samples were taken from each hogshead, after they were weighed, and delivered to the purchasers, as a part of the purchases, to make up the quantity, there was held to be an actual receipt of a part of the goods by the buyer (35). The receipt of a mere sample, not taken from the goods sold, is not sufficient. There may be an actual receipt of goods by the creation of a bailment, as where the purchaser of horses requested the vendor to keep them at livery for him, or a wharfinger or warehouseman, upon receipt of notice of a sale of goods and delivery of the key, makes a new entry of the goods in the name of the vendee (36). There is, in that case, a receipt by the creation of a bailment for the purchaser.

There must be a change of possession. As long as the

(34) Chaplin v. Rogers, 1 East., 192.

(35) Hinde v. Whitehouse, 7 East., 558.

(36) Elmore v. Stone, 1 Taunton, 457.

seller retains possession or a lien on the goods, there can be no receipt by the purchaser. Where the goods are in the possession of a warehouseman, there can be no actual receipt of the goods until the warehouseman accepts the order for delivery to the purchaser and assents to holding the goods for him (37). Whenever the goods are in the possession of a bailee, the creation of the relation of bailment between the bailee and the purchaser is a satisfaction of the statute, by a receipt of the goods on the part of the buyer. A sale may take place by parol, where the purchaser already has possession as a bailee for the seller.

§ 24. "Give something in earnest to bind the bargain or in part of payment." The distinction between giving something "in earnest" and as part payment of the price is of no importance at the present time. The part payment may be in money, or property, or the use of property, or services; in fact, any valuable consideration. The buyer's check may be a part payment, if accepted as such (38). Unless the statute expressly requires that the part payment be made at the time of the contract, it is not necessary that the payment be made at the precise period of making the verbal agreement (39). In those states where the statute requires the payment to be made "at the time," a part payment made at a later time will render the verbal contract valid, if at the time the payment is made the contract be reaffirmed by the

(37) Bentall v. Burn, 3 B. & C., 423.
(38) Hunter v. Wetsell, 84 N. Y., 549.
(39) Thompson v. Alger, 12 Metcalf, 424.

parties, in which case the contract is regarded as entered into at the time of the payment (40).

In Walker v. Nussey (41) the plaintiff sold and delivered goods above ten pounds in value, to the defendant, who had previously sold goods to him for four pounds. It was agreed between them that that sum should be taken as part payment and that the defendant should only pay the difference. It was held that the four pounds could not be taken as a part payment, to satisfy the statute of frauds. The part payment must take place either at or subsequent to the time the contract is made.

The payment may be made by the purchaser or by a third person on his behalf, but a promise of payment, either by the purchaser or by a third person, is not to be regarded as a part payment. Where A, who has sold goods to B, agrees that if C will promise to pay him a certain sum, he will give credit for that amount to B, such a promise made by C does not amount to a payment (42). The payment must be received and accepted as such by the seller. A tender of payment is not sufficient (43).

§ 25. **"Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."** A "note or memorandum" is all that is required. A formal contract or bill of sale is not

(40) Jackson v. Tupper, 101 N. Y., 515.
(41) 16 M. & W., 302.
(42) Artcher v. Zeh, 5 Hill (N. Y.), 200.
(43) Edgerton v. Hodge, 41 Vt., 676.

necessary to satisfy the statute. The memorandum may be written with a lead pencil. It is not necessary that the memorandum be signed by both parties. If one party has signed the memorandum, the contract can be enforced against him, though not against the other.

"The party to be charged" is the party against whom enforcement of the contract or recovery is sought. The party signing may use his initials alone, or a mark, if it be intended as his signature. The signature may be placed anywhere upon the memorandum, as where one draws up an agreement or memorandum in his own handwriting, beginning, "I, A. B., agree," having a place for his signature at the bottom, but never signs it. But if the statute requires the note or memorandum to be "subscribed," it must be signed at the end. The signature may be printed, as where the seller's name was printed at the head of a bill of parcels and he filled in the name of the buyer and a list of the articles. The printed form is here *adopted* by the seller, and is sufficient as a signature (44). The memorandum need not be signed at the time of entering into the contract.

§ 26. **Same: Papers not intended as memorandum may be used.** The memorandum need not be all contained in one paper, but may be in correspondence or on different papers, which refer to the same transaction and are sufficiently connected by reference to allow them to be received in evidence together, as if they constituted one document (45).

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(44) Schneider v. Norris, 2 M. & S., 286.

(45) Lerned v. Wannemacher, 9 Allen, 412.

A set of letters between the purchaser and his agent, which, as a whole, set out all the terms of the contract, is a sufficient memorandum, within the statute (46). It is not necessary that the party making the memorandum should intend it to be one; often his intention is decidedly otherwise. Even a letter expressly repudiating the transaction, but sufficiently setting forth its terms, is a sufficient memorandum of the bargain (47). It may be contained in telegrams, although the message which is actually delivered is not signed by the other party. The memorandum must either be some writing, which contains the terms of the contract, or connected with some other writing which does. If the terms of the bargain are contained in some other document, it must be sufficiently connected by reference with the writing which is signed, to make it a part of it. "When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the agreement signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by parol evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by parol evidence" (48).

§ 27. Verbal alteration of contract. Contents of memorandum. A contract for the sale of goods once made and the statute complied with cannot be varied by a verbal

(46) Gibson v. Holland, 1 C. P., 1.

(47) Bailey v. Sweeting, 30 L. J. Rep. C. P., 150.

(48) Long v. Millar, 4 Com. Pl. Div., 450; Beckwith v. Talbot, 95 U. S., 289.

agreement which changes its terms, as an extension of the time of delivery. A new contract is not made, since the statute is not complied with by the requisite note or memorandum, and the old contract was not intended to be rescinded by a new one which is invalid (49). An oral rescission of the whole contract, intended as such, however, is valid (49a).

The memorandum must contain the names of both the buyer and the seller (50). It is sufficient if it can be shown that it was understood by the parties themselves; and it may be shown by other evidence who was the buyer and who the seller (51). The memorandum must be sufficient to show the material terms of the bargain, including generally a description of the goods sold, sufficient to identify them with certainty, the parties to the transaction and the price. In some states it is expressly declared in the statute that the consideration must be named in the memorandum. In a large number, probably a majority of the states, it is held that the consideration must be stated, but many states hold otherwise, and in some states, by statute, the consideration need not be stated.

§ 28. **Signing memorandum by agents.** The agent must be some third person, and cannot be the other contracting party (52). One agent, however, may act for

(49) Noble v. Ward, L. R., 2 Exch., 135.

(49a) Goss v. Lord Nugent, 5 B. & Ad. 58, 66.

(50) Champion v. Plummer, 1 New Rep., 252; Grafton v. Cummings, 99 U. S., 100.

(51) Newell v. Radford, L. R., 3 Com. Pl., 52.

(52) Wright v. Dannah, 2 Campbell, 203.

both parties. An auctioneer, while he is the agent of the seller in accepting bids and thus completing the contract, may act as the agent of the buyer in signing the memorandum required by the statute of frauds. Where the parties to the contract deal through a broker and know that he is acting in his capacity as such, he has authority to bind them both by making a memorandum of the contract in writing, and signing it in their behalf respectively (53). The broker may make the memorandum in his own book, and, when bought and sold notes are delivered to the parties, the entry in the broker's book is original evidence of the contract (54). It is not necessary that the authority of the agent be in writing. He may be appointed by parol, unless the statute specifies that his appointment be evidenced by a writing.

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(53) Coddington v. Goddard, 16 Gray, 436.

(54) Sievewright v. Archibald, 17 Q. B., 103.

CHAPTER III.

SUBJECT-MATTER OF CONTRACT. PRICE.

§ 29. **Sale of future goods: Seller with potential interest.** In order to have a valid sale of goods, in which case the title to the goods passes to the buyer, the subject-matter of the sale must be in existence and owned by the seller. One cannot sell goods in which one has no property interest at the time of the sale. One may sell goods in which one has a *potential* interest, that is, a present interest in the property of which the thing sold is the product or growth or increase; thus, a man may sell the wool to be grown upon his own sheep, or the crops to be grown upon his own land, or the offspring of animals of which he is the present owner; but not the wool to be grown upon the sheep of another; or the crops to be grown upon land in which he has no present interest; or the offspring of animals which he does not own.

In the case of a sale of goods having a potential existence, the property vests in the buyer as soon as it comes into existence, without any act on the part of either the buyer or the seller. In Hull v. Hull (1), the owner sold to the superintendent of his farm two mares, and agreed that the mares and their offspring might be kept upon his farm, at his expense, as compensation to the pur-

(1) 48 Conn., 250.

chaser for services as superintendent of his farm. As the possession of the mares was kept by the seller, it may be that, under a principle which we shall consider later (§ 77), the title to the mares did not pass, except as between the parties and those having notice. But, even if title to the mares did not pass, it was held that the title to the colts vested in the purchaser at the time they came into existence. The title to the colts could vest in the purchaser only on the ground that title passes to things in potential existence. As between the parties, the title passed to the mares; and title to the colts passed, good against all the world.

§ 30. **Same: Seller with no interest.** The seller, at the time of the sale, must have an interest, actual or potential, in the thing sold. A mere possibility and expectancy, coupled with no present interest, is not sufficient. In Low v. Pew (2), fishermen sold their catch of halibut before the fishing voyage was made, at a certain price per pound, and $1500 was paid down by the purchaser. Before the return of the ship, the fishermen became bankrupt, and, on the return of the ship, the assignees took possession. The purchaser replevied $1500 worth of fish, and offered to buy the rest at the same price. It was held that the purchaser took nothing by the sale. Fish to be caught are not the subject of sale. It was intended as a present sale and not an executory agreement to sell at some future day.

Most of the authorities upon the question of the control

(2) 108 Mass., 347.

of an owner of land over future crops have arisen in cases concerning mortgages rather than sales, but the same principles are applicable, as far as the transfer of the property is concerned. The owner of land may sell or mortgage a crop to be grown thereon (3), although in some states a sale or mortgage is not valid unless the crop has been planted. In Nebraska, the rule is in doubt, the cases being confused (4). The modern cases are generally based upon the early case of Grantham v. Hawley (5), where the lessor in a twenty-one year lease, beginning in April, covenanted that the leesee might carry away such corn as should be growing upon the ground at the end of the term. It was held that this was a valid grant of the corn that should be growing upon the land twenty-one years hence.

§ 31. **Same: Actual possession taken. Estoppel.** Where future property is sold, and the buyer takes possession after the property comes into existence, there is in that case a new intervening act and the property passes. The intention of the parties that the future property shall pass is not effectual unless possession of the property is taken, when it comes into existence. The title to property sold may vest in the purchaser on the ground of estoppel. If the seller afterwards acquires title to the property purported to be sold by him, he will be estopped to deny that he had title when he made the

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(3) Dickey v. Waldo, 97 Mich., 255; 23 L. R. A., 449, and note.

(4) Brown v. Neilson, 61 Neb., 765; Sporer v. McDermott, 69 Neb., 533.

(5) Hobart, 132.

sale. Of course this estoppel can never take effect if the seller never acquires any title. The title passes to the purchaser upon the acquisition of title by the seller. But, if the seller, after he acquires title, but while still in possession of the goods, sells the goods to an innocent purchaser without notice of the former sale, this purchaser will acquire title to the property. See § 77, below.

§ 32. **Future sales in equity.** While, at law, property in which the seller has no present interest can not be sold, so as to pass any property to the purchaser until he actually takes possession, an assignment may be made to which effect will be given in equity. The moment the property comes into existence, or is acquired by the assignor, the assignment takes effect upon it. In Holroyd v. Marshall (6), the leading case, one Taylor, a manufacturer, sold the machinery in his mill as security for his indebtedness, the deed containing a covenant that all machinery placed in the mill, in addition to and in substitution for that covered by the bill of sale, should be subject to the assignment. Taylor remained in possession. He sold and exchanged some of the old machinery and introduced some new machinery, of which he rendered an account to the assignees, but no conveyance was made of the new machinery to them nor was any possession taken by or for them. Execution creditors of Taylor levied upon the machinery, purchased by Taylor after the date of the assignment, and sold it. The assignees brought their bill against the sheriff. It was held that

(6) 10 H. L. C., 191.

the whole machinery in the mill, including the added and substituted articles, at the time of the execution, vested in the assignees by virtue of the assignment. They were entitled to the after acquired property in preference to the judgment creditors, although there was no new intervening act on their part. The deed, together with the bringing of the machinery on the premises, was sufficient to complete the title. The equitable title prevails, even though the judgment creditor has no notice of it.

The rule laid down in Holroyd v. Marshall, that the equitable interest in the goods passes to the purchaser upon the acquisition of the goods by the seller, is followed by a majority of the decisions in this country (7). There are many cases contra (8), holding especially that a sale of goods is not valid against creditors unless possession is taken.

§ 33. **Contract to sell future goods.** There is nothing illegal at common law about a contract to sell goods afterwards to be acquired by the seller. It is a contract, however, that may easily be a subject of gambling; and such a contract is illegal as a gambling contract, where the parties do not intend that it shall ever be carried out, but intend merely that it shall be broken, and that the difference between the contract price and the market price of the goods, at the time of delivery, shall be paid. A contract for the sale of goods, which the seller is to acquire by purchase, is a valid contract if the parties act

(7) See especially: Mitchell v. Winslow, 2 Story, 630; Kribbs v. Alford, 120 N. Y., 519; Lundlum v. Rothschild, 41 Minn., 218.

(8) Blanchard v. Cooke, 144 Mass., 207.

in good faith, or if one of the parties acts in good faith.

The Sales Act contains the following provision: "1. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called 'future goods.' 2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. 3. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods"(9).

§ 34. **Sale of undivided shares of goods.** "There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to affect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares" (10).

This provision of the Sales Act is simply declaratory of what has been the law from the earliest times. A tenant in common of goods may sell his interest therein to a co-tenant or a third person. The buyer becomes a tenant in common with the other owners. The goods are at the risk of all the co-owners in proportion to their interests therein.

"In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number,

(9) Sales Act, sec. 5.

(10) Sales Act, sec. 6.

weight, or measure of the goods in the mass, and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight, or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears'' (11).

By ''fungible'' goods is meant goods of such a nature that they may be replaced by other goods of equal quantity and quality; such as grain, coal, and wine. The term is defined by the Sales Act as follows: '' 'Fungible goods' means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit'' (12). All of the holders of receipts of grain stored in an elevator are tenants in common of the grain therein, in the proportion that the receipts of each bear to the total of the receipts outstanding. The sale of a certain quantity out of an undetermined mass transfers the property in that quantity. A part of the mass may be sold without actual separation, where the mass is ascertained and all parts are of the same value and undistinguished from one another. Where the owner of two piles of wheat containing 6,249 bushels, sold 6,000 bushels, giving the buyer a receipt that he held that amount for him, the

(11) See note 10.

(12) Sales Act, sec. 76.

purchaser acquired good title to the 6,000 bushels (13). In such case each party has the right of severing the tenancy in common by taking the proportion of the mass, which belongs to him.

§ 35. **Destruction of goods: Sale.** "Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void" (14).

In a sale of goods, obviously the existence of the goods is essential to the performance of the contract; and, under a simple doctrine of the law of contracts, where the performance of the contract has become impossible on account of the non-existence of the subject-matter of the contract, through no fault of either party, the contract is discharged (15). This may be put either upon the ground of impossibility of performance or that of mutual mistake. The seller is excused from delivery of the goods, owing to impossibility, through no fault of his; and the buyer is excused from paying the price, through failure of consideration. And both the buyer and seller are excused from performance, or liability for non-performance, on the ground of mutual mistake.

Where the goods are partly destroyed, it is impossible for the seller to fulfill his contract, and, if without his fault, he is excused on the ground of impossibility. The buyer has the option of accepting the goods that remain, upon paying the proportionate part of the price. The

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(13) Kimberly v. Patchin, 19 N. Y., 330.

(14) Sales Act, sec. 7.

(15) Dexter v. Norton, 47 N. Y., 62.

same is true where the goods are inferior in quality to that supposed by the parties. These principles are expressed in the Sales Act, as follows: "Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale: (a) As avoided; or (b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible" (16).

§ 36. **Same: Contract to sell.** Where, instead of a sale, there is a contract to sell, the same principles apply in case of a destruction or a partial destruction or deterioration of the goods. When it is not possible for the parties to perform the contract which they entered into, as entered into, they are excused. If goods contracted to be sold are totally or partially destroyed before they are transferred to the buyer, there is an unqualified rescission of the contract, and the purchaser may recover so much of the purchase price as has been paid (17).

"Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided. Where there is a contract to sell specific goods, and sub-

(16) Sales Act, sec. 7.

(17) Kelly v. Bliss, 54 Wis., 187; Curtis v. Hanney, 3 Esp., 82.

sequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract: (a) As avoided; or (b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding upon the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible'' (18).

§ 37. Definition and ascertainment of price. The price is the consideration furnished by the buyer, paid or promised to be paid, for the goods. The term applies to money or money's worth. ''The price may be payable in any personal property'' (19). If the price be payable in goods, they must be taken at a money valuation. An exchange or barter is a sale, where the goods are taken at a certain money valuation, as eggs per dozen or poultry per pound.

''The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties'' (20).

The parties ordinarily agree upon the price at the time of entering into the contract, but they may agree

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(18) Sales Act, sec. 8.

(19) Sales Act, sec. 9.

(20) See note 19.

upon almost any method of determining the price; such as, that it may be determined by a third person, or by the usual course of dealing between the parties or in the locality, or by the amount received by the buyer upon a resale, or with reference to other sales or reports of sales at a certain specified place and future time, or according to the market price at the time or on a certain specified day. Often the parties enter into the contract without specifying any price. This ordinarily happens in buying goods for immediate domestic use. In such case, the buyer must pay a reasonable price. "Where the price is not determined in accordance with the foregoing provisions" (quoted above) "the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case" (21). The question of what is a reasonable price, in case of disagreement, is, of course, to be determined by the jury. Generally the market price at the time and place of the sale governs.

§ 38. **Sale at a valuation.** "Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor"(22).

(21) See note 19.
(22) Sales Act, sec. 10.

The fixing of the price by the third person is a condition precedent to the liability of the buyer upon the contract. If any part of the goods have been delivered to and appropriated by the buyer, the liability is quasi-contractual, i. e. for the amount that he has been benefited. Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may maintain an action for damages against the party in fault, or may pursue whatever legal remedy is appropriate for redressing the injury which he has sustained.

CHAPTER IV.

CONDITIONS AND WARRANTIES.

§ 39. Condition and warranty distinguished. These two terms are often confused. Much of the confusion has been caused by the English cases, in which the term "condition" is often used in the sense of "warranty." The two terms should be carefully distinguished. A condition is a statement or a promise which is of the essence of the contract, a breach of which discharges the contract altogether. In a sale of goods, a tender of the goods agreed upon or of goods of the kind agreed upon, as the case may be, is a condition precedent to any liability of the purchaser for the payment of the price. A warranty, as distinguished from a condition, is a collateral agreement or subsidiary promise, which is not of the essence of the contract, and a breach of which only gives rise to an action for damages, or other appropriate remedy.

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty" (1).

(1) Sales Act, sec. 12.

A breach of warranty does not defeat the completion of the sale. It does not prevent the vesting of the property in the goods in the buyer, nor bar the right of the seller to the price. In Chanter v. Hopkins (2) Lord Abinger said: "A good deal of confusion has arisen from the unfortunate use made of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of something which the parties undertake shall be a part of a contract, and though part of the contract, yet collateral to the express object of it. But in many of the cases . . . the circumstances of a party selling a particular thing by its proper description has been called a warranty, and a breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill, as, if a man offer to buy peas of another, and he send him beans, he does not perform his contract, but that is not a warranty. There is no warranty that he should sell him peas. The contract is to sell peas, and if he sells him anything else in their stead, it is a non-compliance with it." Whether a term in the contract amounts to a condition, the non-performance of which amounts to a non-performance of the contract itself, or is only a warranty, is determined by the intention of the parties, and is proven by the wording of the contract and the circumstances of the particular case.

§ 40. **Broken condition may be treated as warranty.** A condition may be broken and yet the injured party so

(2) 4 M. & W., 399.

far acquiesce as to lose his right to a discharge and have only his action for damages, as for a breach of warranty. In Pope v. Allis (3) there was a sale of a specified amount of iron of a certain grade. When the iron arrived, it was of a different quality from that which the contract required. The purchaser rejected it altogether, and was held entitled to recover the price which he had paid. But, on the other hand, in Wolcott vs. Mount (4) there was a sale of strap-leaf red-top turnip seed to one who was accustomed to raise turnips for the early New York market and make large profits, as the seller knew. The seed proved of another kind and the crop was practically worthless. The seed could not be distinguished except by means of the crop that came up. It was held that as rescission was here impracticable the broken condition as to the subject matter of the sale virtually became a warranty on which suit could be brought for damages.

The distinction is shown in the language of the Sales Act, as follows: "1. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty. 2. Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to

(3) 115 U. S., 363.

(4) 7 Vroom (N. J.), 262

furnish goods as described and as warranted expressly or by implication in the contract to sell, as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods'' (5).

§ 41. **Scope of warranties.** There can be no warranty where the statement can be only a matter of opinion. In Jendwine v. Slade (6) old pictures were sold under a catalogue, the name of the artist being opposite the picture. It was held that as the artist died more than one hundred years before the sale, the genuineness of the pictures could be only a matter of opinion, and hence there was no warranty. Lord Kenyon said that the catalogue imported ''that in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it.'' In Power v. Barham (7), however, there was a sale of pictures represented to be by Canaletti, an artist who died sixty-four years previous to the sale. The jury in that case found that there was a warranty. The case was submitted to their consideration, upon the whole of the evidence, whether the seller had made a representation as part of his contract that the pictures were genuine, not using the name of Canaletti as matter of description merely or as an expression of opinion upon something as to which both parties were to exercise a judgment, but taking upon himself to represent that the pictures were Canaletti's.

§ 42. **Warranties against visible defects.** There can be

(5) Sales Act, sec 11.
(6) 2 Esp., 572.
(7) 4 Adol. & Ellis, 473.

no warranty where the defects are actually known and understood by the purchaser at the time of the bargain. In McCormick v. Kelly (8) there was a sale of a harvest machine. The purchaser had had the machine on trial and found defects which the seller promised to remedy and to make the harvester as good as any on the market. These facts were held no defense in an action on the note given for the purchase price. The court said: "A general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty; and both the weight of authority and reason authorize this proposition, viz.: that for representations in the terms or form of a warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain." A warranty will not extend to guard against defects that are plain and obvious to the senses of the purchaser, and which require no skill to detect, unless the vendor uses art to conceal, and does conceal, such defects (9). There are often cases where the defect is visible, but its extent can not be ascertained. In Margeston v. Wright (10) a horse sold was warranted sound *at the time of the sale.* He afterwards became lame from a splint, visible at the time of the sale. The seller was held liable on a warranty. As some splints cause lameness and others do not, the parties must have

(8) 28 Minn., 135.
(9) Kenner v. Harding, 85 Ill., 264, 268.
(10) 8 Bing., 454.

meant that this was not a splint which would be the cause of future lameness.

§ 43. **Sale upon a contingency.** In a sale of goods "to arrive," the arrival of the goods is a condition precedent to the completion of the sale in the case of a contract to sell; and a condition subsequent, which divests the property in the goods, in the case of a completed sale. In Rogers v. Woodruff (11) there was a sale of 3,000 sacks of salt, "to arrive by the 15th November." The action was for 883 sacks delivered between November 15th and December 8th. The purchaser claimed damages for the failure to deliver the full amount by November 15th. It was held that the words "to arrive by the 15th November" were words of condition and description only and could not be construed as a warranty that the salt should arrive by the day named. "Contracts of this description —for the sale of goods to arrive—are conditional, the words 'to arrive' or other equivalent words not importing a warranty that the goods will arrive, and the obligation to perform the contract by an actual transfer of the property being, therefore, in the absence of other words showing a contrary intent, contingent upon its arrival." The words "to arrive" do not of themselves import a promise that the goods shall arrive. No title passes until the goods have actually arrived. The seller may, of course, warrant the arrival of the goods.

§ 44. **Construction of various contingencies.** Where a time is fixed for the delivery of the goods, the early cases

(11) 23 Ohio St., 632.

treated this as of the essence of the contract, and, if the condition was not fulfilled, the purchaser might treat the contract as discharged (12).

Whether time is of the essence of the contract is a question of construction in which the intention of the parties is to govern and is proved by the language used, as construed in the light of the circumstances of the case.

Where goods are sold on condition that they shall be satisfactory to the buyer, a common condition in sales of machinery, it is generally held that such contracts are to be construed as meaning that the goods should be satisfactory to a reasonable man (13). Where such a contract is to be interpreted literally, the purchaser is the sole judge and may reject the goods without assigning any reason for dissatisfaction (14). This is especially true in cases of the sale of works of art, where the satisfaction of the buyer is to depend upon personal taste, or whim.

The purchaser must have an opportunity for trial. In Hunt v. Wyman (15) there were negotiations for the purchase of a horse, where it was doubtless the agreement that the horse was to become the property of the purchaser if satisfactory to him; but it was agreed that "if he did not like it he would return it in as good condition as he got it." The horse escaped before any opportunity

(12) Hoare v. Rennie, 5 H. & N., 19; Simpson v. Crippin, L. R. 8, Q. B., 14; Norrington v. Wright, 115 U. S., 188, and cases there reviewed.

(13) Hawkins v. Graham, 149 Mass., 284.

(14) Campbell Printing Press Company v. Thorp, 36 Fed. Rep., 414.

(15) 100 Mass., 198.

was had for trial and in fact was never returned to the owner. Obviously there was only a bailment and no sale. Whenever a sale is made upon a contingency which may or may not happen, the happening of the contingency is a condition precedent to the completion of the sale.

§ 45. **Implied warranties of title.** "In a contract to sell or a sale, unless a contrary intention appears, there is: 1. An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass. 2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale. 3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made. 4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest" (16).

It is the established doctrine in England that by a sale of goods the seller holds himself out to the purchaser as having title; that there is, then, a warranty. The leading case is Eichholz v. Bannister (17), which was an action to recover back money which the plaintiff had paid

(16) Sales Act, sec. 13.

(17) 17 C. B. (N. S.), 708.

for goods bought by him in the defendant's shop, which were afterwards claimed from him by a third person, the true owner, from whom they had been stolen. The claim was made as upon a failure of consideration. The court said: "No doubt, if a shopkeeper in words or by his conduct affirms at the time of the sale that he is the owner of the goods, such affirmation becomes part of the contract, and, if it turns out that he is not the owner, so that the goods are lost to the buyer, the price which he has received may be recovered back. . . . The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion, that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money." In this country it has sometimes been said that a different rule prevails when the property is in the possession of a third person. When the vendor is in possession, the rule is universal that there is an implied warranty of title. The exception, where the possession is in a third person, has been much discredited in later decisions. "There seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant" (18).

§ 46. **Same: Various details.** The seller may, of course, sell merely his right, title and interest in the goods, without a warranty. There is conflict in the au-

(18) 1 Smith's Leading Cases, Am. ed. (Edson's), 344.

thorities, as to whether the buyer has an action for breach of warranty of title before his possession has been interfered with (19). There is an implied warranty of title in the sale of all personal property, including commercial paper, stocks, bonds, and all other rights and choses in action. Clause 3 of the Sales Act, quoted above, providing that there is an implied warranty that the goods shall be free from any charge or incumbrance in favor of any third person, is merely in accordance with clause 1 and the general rule of law that a warranty of title is a warranty that the title is free from any charge or incumbrance in favor of any third person. Most of the cases arise in regard to property incumbered by a mortgage.

Where the seller is a judicial officer, mortgagee, or other person professing to sell, by virtue of authority, the goods of a third person, such person is taken to warrant only his authority to act for the principal, but not the principal's title to the goods (20). A pawnbroker selling unredeemed pledged goods is not liable upon an implied warranty of title. In Morley v. Attenborough (21) a pawnbroker sold a harp, which was unredeemed. It was taken in the course of the pawnbroker's business from one who had no title. The real owner obliged the purchaser to give it up. It was held that the purchaser had no recourse against the pawnbroker upon an implied warranty. He bought simply the right which the seller

(19) That no action lies, Linton v. Porter, 31 Ill., 107; Gross v. Kierski, 41 Cal. 111. Contra, Perkins v. Whelan, 166 Mass., 542; Matheny v. Mason, 73 Mo., 677, 683.

(20) See Mechem on Agency, secs. 541 ff.

(21) 3 Exch. 500.

had, which was simply the right which the pawner had. It was said to be not like the case where articles are bought in a shop professedly carried on for the sale of goods, in which case the vendor sells "as his own."

§ 47. **Implied warranty in sale by description.** "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description" (22).

It would seem that what is here called an "implied warranty" amounts to a condition; that it is a condition precedent of the contract itself that goods shall be delivered which correspond with the description. "If a man offer to buy peas of another, and he sends him beans, he does not perform his contract." A contract for the sale of strap-leaf red-top turnip seed is not performed by furnishing Russia turnip seed. In Varley v. Whipp (23) there was a sale of a reaping machine which the purchaser had never seen and which the seller said was new the year before and had only been used to cut 50 to 60 acres. The machine was delivered, but proved to be a very old one. There was here a sale by description and an implied condition that the goods should correspond with the description. The contract itself was not performed by the seller.

(22) Sales Act, sec. 14.

(23) [1900] 1 Q. B., 513.

Where goods are sold by sample and description, it is not enough that the goods correspond with the sample if they do not correspond with the description. In Gould v. Stein (24) there was a sale of "102 bales of Ceara scrap-rubber, as per samples, . . . of second quality." The contract was broken by the failure to deliver rubber "of second quality," although it was equal to the samples.

§ 48. **Implied warranties of quality.** In regard to the quality of goods sold, the maxim of caveat emptor (let the buyer beware) is the general rule. A purchaser must use his own judgment, or else take care to have an express warranty made a part of his contract of purchase. But there are qualifications of this general rule. Where goods are bought for a particular purpose, known to the seller and in reliance upon the judgment of the seller, there is an implied warranty that the goods shall be reasonably fit for such purpose. Where they are bought by description there is an implied warranty that they shall correspond with the description; and where the seller deals in goods of that description, there is also an implied warranty that the goods shall be merchantable. Where they are sold by sample, there is an implied warranty that they shall correspond with the sample. The buyer must have an opportunity for inspection. There are, then, at the present time, implied warranties that, where the goods are bought for a particular purpose, known to the seller, they shall be reasonably fit for such

(24) 149 Mass., 570.

purpose; that they shall correspond with the description and with the sample, if any; and that, where the seller deals in goods of that description, they shall be merchantable.

These principles are expressed in the Sales Act, as follows: "Subject to the provisions of this act and of any other statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose. 2. Where the goods are bought by description from a seller who deals in goods of that description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality. 3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. 4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose. 5. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. 6. An express warranty or condition does not negative a warranty or

condition implied under this act unless inconsistent therewith'' (25).

§ 49. **Same: Merchantability.** There was formerly no implied warranty of quality. The maxim of caveat emptor (let the buyer beware) was without exception or qualification. In 1815, however, in Gardiner v. Gray (26), where twelve bags of waste silk had been bought, which proved unmerchantable, it was said that ''the purchaser has a right to expect a salable article answering the description in the contract. . . . He cannot without a warranty insist that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be that it shall be salable in the market, under the denomination mentioned in the contract between them.'' This case established the doctrine of the warranty of merchantableness in such cases. In 1868, in the case of Jones v. Just (27) the modern law upon the subject of implied warranty was settled. In that case there was a purchase of Manilla hemp, to arrive. The hemp arrived and was Manilla, as contracted for, but, at some time before shipment, had been shipwrecked and wet with salt water, and dried and repacked. The purchasers sold it and realized 75 per cent of its value if undamaged, nearly up to the contract price, as hemp had advanced. In an action upon an implied warranty of quality, it was held that the contract was not fulfilled by shipping any hemp which was Manilla, but that it

(25) Sales Act, sec. 15.

(26) 4 Campbell, 144.

(27) L. R. 3 Q. B., 197.

must be merchantable. In Murchie v. Cornell (27a) there was a sale of a cargo of ice, to be shipped from Maine to New Bedford. It was either not identified but to be appropriated by the sellers, or else was identified by the contract, but the purchasers had no opportunity to examine it. It was held that there was an implied warranty of merchantableness. "In a contract for the sale of ice at wholesale by a dealer in the article to one to be sold again, where there is no opportunity for inspection of the ice, and no express warranty is made, there is an implied warranty that the ice sold is merchantable and salable as ice for ordinary retail use."

§ 50. **Same: Goods bought for particular purpose.** In cases where the seller knows the particular purpose for which the goods are required and the buyer relies on the seller's skill or judgment, the implied warranty is well established. In Randall v. Newson (28) a carriage manufacturer made and fitted a pole for a carriage. Owing to a latent defect, the pole broke and the horses were injured. The seller was guilty of no negligence. It was held that on a sale of an article for a specific purpose there is a warranty that it is reasonably fit for the purpose, and there is no exception in the case of a latent or an undiscovered defect. The buyer recovered the price of the pole and also for the injury to his horses, that injury being considered a natural consequence of the defect in the pole. "If a man sells generally, he undertakes that the article sold is fit for some purpose; if he

(27a) 155 Mass., 60.

(28) 2 Q. B. Div., 102.

sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

§ 51. **Same: Seller not a producer of article sold.** In that case, and in Kellogg Bridge Company v. Hamilton (29), the leading case in this country, the seller was a manufacturer. In a majority of the courts in this country the same principle does not apply when he is merely a dealer. In Dounce v. Dow (30) there was a sale of a certain amount of "XX pipe iron," which proved to be rotten and worthless. This quality could have been ascertained by the purchaser before using by melting or by breaking, but he made no examination and used half the iron up before discovering its defect. The seller was a dealer in iron and acted in good faith. There was held to be no implied warranty. It was said by the court: "The plaintiff was not a manufacturer but a dealer in 'pig metals,' and was not presumed to know the precise quality of every lot of pigs bought and sold by him, bearing that brand, and hence cannot be held to have warranted that the pigs in question were of any certain quality. . . . . There was no fraud. Both parties supposed, doubtless, that the iron was first quality for the purpose for which it was intended. But it is not enough that the plaintiff knew such purpose. . . . . If the defendants (purchasers) had ordered XX pipe iron, which was tough and soft, and fit for manufacturing agricultural implements, and the plaintiff (seller) agreed to

(29) 110 U. S., 108.
(30) 64 N. Y., 411.

deliver iron of that quality, a warranty would have been established."

It will be noticed that under the Sales Act (§ 48, above) the principle is made to apply to anyone, whether a manufacturer or not, if it appears that the buyer relies on the seller's skill or judgment. This seems the better doctrine. It was adopted by the Vermont court in Wing v. Chapman (31), where it was said: "The question has been much discussed whether this doctrine applies in cases where the seller was not the manufacturer of the goods sold; but it is now settled that it applies generally to all sales of property for a special purpose, if the sale is made on the judgment and skill of the vendor."

§ 52. **Same: Sales of food.** In the sale of articles of food by a manufacturer or common dealer, there is an implied warranty that they are fit for food, but there is no such implied warranty in case the seller is not a manufacturer or dealer. In Burnby v. Bollett (32) the defendant bought the carcass of a pig, from a purchaser in a public market, and left it there to take away later. In the meantime he sold it to the plaintiff, without any warranty. There was a secret defect, not known to any one, and it turned out to be measly. It was held that no warranty of soundness was to be implied. Had the seller been himself a dealer, it would have been otherwise, especially if the buyer was buying for immediate consumption.

§ 53. **Same: Examination by buyer. Trade usage.** Where the buyer has examined the goods, or has had the

(31) 49 Vt., 33, 25.

(32) 16 M. & W., 644.

opportunity to examine them, there is no basis for an implied warranty unless the defects be latent, i. e., defects which cannot be discovered by inspection. That an implied warranty may be annexed by the usage of trade is merely in accord with the general rule of law, that the parties to any contract are bound by the usages of trade. They are not bound by any usage which is inconsistent with the general rules of law or with the terms of the contract they have made.

§ 54. **Sale by sample.** There is a sale by sample only when it is understood by the parties, as one of the terms of the contract, that it is to be a sale by sample. In Barnard v. Kellogg (33) there was a sale of wool. Samples were sent, at the request of the purchasers, who offered to take the wool if equal to the samples furnished. The seller accepted the offer, provided the purchasers examined the wool on a certain future day and reported whether or not they would take it. One of the purchasers examined four bales and was offered an opportunity to examine the whole lot. It was afterwards found that a portion of the bales were falsely packed, by placing in the interior damaged wool and tags. The seller acted in good faith. It was held that this was no sale by sample, the court saying: "Both sides understood that the buyer, if he bought, was to be his own judge of the quality of the article he purchased. Barnard expressly stipulated, as a condition of sale, that Kellogg should examine the wool, and he did examine it for himself. If Kellogg

(33) 10 Wallace, 383.

intended to rely on the samples as a basis of purchase, why did he . . . . inspect the bales at all, after notice that such inspection was necessary before the sale could be completed? His conduct is wholly inconsistent with the theory of a sale by sample."

§ 55. Implied warranties in sale by sample. "In the case of a contract to sell or a sale by sample: (a) There is an implied warranty that the bulk shall correspond with the sample in quality" (34). As the buyer may reject the goods bought by sample, if they are not equal in quality to the sample, that they shall correspond amounts to a condition. The contract is not performed by supplying goods of an inferior quality.

"(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as is otherwise provided in section forty-seven, clause 3" (35.) This exception is where the goods are sent by a carrier, but not to be delivered until the buyer has paid the price (§ 88, below). As a general rule, a purchaser is entitled to see what he has bought, before paying the price.

"(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample" (36). The goods may correspond with the sample, and yet have a latent defect which renders them

(34) Sales Act, sec. 16.
(35) See note 34.
(36) See note 34.

unmerchantable. In such case, the seller is liable upon an implied warranty. In Drummond v. Van Ingen (37) cloth was ordered by sample from the manufacturers, who knew that the buyers were to sell it again to tailors. The goods were like the sample, but had a defect such as to render them unmerchantable for the purpose for which goods of that class had been used. The same defect was in the sample, but was not discoverable by due diligence upon such inspection as is ordinarily made. There was here held to be an implied warranty that the goods should be fit for use in the manner such goods were ordinarily used. That the goods supplied were exactly what had been ordered was no defense.

(37) 12 App. Cas., 284.

CHAPTER V.

TRANSFER OF TITLE.

Section 1. As Between Seller and Buyer.

§ 56. **No property passes until goods are ascertained.** "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6" (1).

This is the well established rule. Section 6, here referred to, contains the provision in regard to the sale of undivided shares (§ 34, above). It was there shown that the property may be transferred in an undivided share of ascertained goods, although there be no separation of the quantity sold, if such be shown to be the intention of the parties. In Aldridge v. Johnson (2) there was a sale of 100 out of a 200 to 300 quarter lot of barley, which was in a large heap, it being agreed that the buyer should send sacks which the seller should fill and take to the railway and put upon trucks. The buyer sent 200 sacks, enough to contain the 100 quarters purchased. After the seller had filled 155 sacks, being unable to get trucks to transport them, he emptied the sacks back on to the

(1) Sales Act, sec. 17.

(2) 7 E. & B., 885.

bulk. It was held that the property in what was put into the sacks had passed to the buyer. Where there is a sale of a particular chattel, the property passes by the sale; but if the thing sold is not ascertained, it does not pass until it is ascertained. Here the right of ascertainment rested with the vendor only. When he had done the outward act which showed which part was to be the vendee's property, his election was made and the property passed.

§ 57. **Property in specific goods passes when parties so intend.** "1. When there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. 2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case" (3).

In every contract, the intention of the parties governs, as to all its terms. In a sale of goods, if the parties have made it sufficiently clear when they intend the property shall pass, that intention governs. The intention of the parties is proven, as a question of fact, from the contract itself and the circumstances surrounding the sale (4).

§ 57a. **Rules for ascertaining intention: Sales Act.** "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

(3) Sales Act, sec. 18.

(4) Lingham v. Eggleston, 27 Mich., 324.

"Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

"Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

"Rule 3. (1) When goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

"(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer: (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction. (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

"Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods

of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

"(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section twenty (§ 65, below). This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents.

"Rule 5. If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon" (5).

§ 58. **Same: Contract to sell specific goods in deliverable state.** The terms of the contract may show that it is not the intention of the parties that title shall pass immediately. Such terms as, "delivery to be made and price paid as soon as the quantities can be verified,"

(5) Sales Act, sec. 19.

show that it is the intention of the parties that the transfer of title and the payment of the price shall be simultaneous, and both be postponed until the quantities of the goods are verified and the amount of the purchase money thereby ascertained (6). We shall consider the above rules in order.

Rule 1 states what is really a presumption, that in the absence of a different intention, upon a contract to sell specific goods, in a deliverable state, the property passes to the buyer when the contract is made. In Tarling v. Baxter (7) there were notes of agreement signed on the 4th day of January, to sell and to buy a stack of hay, standing in a certain field, at a certain price, to be paid on the 4th of February, and the hay to be allowed to stand on the premises until the first day of May. The hay was wholly consumed by fire on the 20th of January, without any fault or neglect of either party. It was held that the agreement showed that an immediate sale was intended. The property, then, vested in the buyer and the loss by fire fell upon him. The case establishes the principle that, "in the case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done."

Where the parties agree upon specific goods that are

(6) Sherwin v. Mudge, 127 Mass., 547.

(7) 6 B. & C., 360.

sold and the price that the buyer is to pay, and nothing remains to be done but that the buyer shall pay the price and take the goods, the property passes to the buyer and with it the risk of loss by fire or any other accident. The appropriation of the goods to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the goods is equivalent for the same purpose to his acceptance of possession (8).

§ 59. **Same: Where specific goods are in undeliverable state.** Rule 2 is merely a statement of the established principle that when, after a sale of goods some act remains to be done by the vendor before delivery, such as counting, weighing, measuring, inspecting, and so forth, the property does not vest in the purchaser but continues at the risk of the seller. The leading case is Hanson v. Meyer (9). There, there was an agreement to sell all of the starch belonging to the vendor, the quantity not being ascertained, at £6 per cwt. An order was given to the warehouseman to weigh and deliver all the vendor's starch. A part had been weighed and delivered when the buyer became bankrupt. The court held, in an action of trover brought by the assignees against the vendor, who had removed and refused to deliver the part that had not been weighed or delivered, that the weighing and delivery of part did not operate as a transfer of the property to the whole. The property had passed in only that part of the starch which had been weighed.

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(8) Goddard v. Binney, 115 Mass., 450 (stated in § 15, above), following Dixon v. Yates, 5 B. & Ad., 313, 340.

(9) 6 East., 614.

Lord Ellenborough said, "If anything remain to be done on the part of the seller as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer."

§ 60. **Same: Where acts are to be done by buyer.** If that which remains to be done is to be done by the buyer, instead of by the seller, the presumption is that the parties intend that the property shall pass at once. In Turley v. Bates (10) a pile of fire clay on the land of the seller was sold at 2s. per ton, the purchaser to take it away and have it weighed at his expense. He took away a part but refused to take the residue. In an action for goods bargained and sold, it was held that the property in the whole amount had passed to the buyer. It was there shown that the rule does not apply where what remains to be done is to be done by the buyer, but applies only where something remains to be done by the seller.

This is especially true where the goods have been delivered to the buyer, but something remains to be done in order to ascertain the total value of the goods (11). "The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong if not conclusive evidence of the intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other

(10) 2 H. & C., 200.

(11) Hatch v. Oil Company, 100 U. S., 124.

act is to be done afterwards'' (12). If, however, the delivery is for some special purpose, such as for the purpose of inspecting or testing, that fact may be shown, to rebut any presumption of intent that the property shall vest, from the fact of delivery.

§ 61. **Same: Delivery of goods ''on sale or return'' and ''on approval.''** The question, which is involved in the cases mentioned in Rule 3, where the goods are delivered ''on sale or return,'' or ''on approval or on trial or on satisfaction,'' is a question of fact, depending upon the intention of the parties. Where the goods are delivered ''on sale or return'' the property in the goods passes to the buyer, with the option in the buyer of returning the goods and thus rescinding the sale. This is clearly a sale with a condition subsequent (§ 5, above).

Where the goods are delivered ''on approval,'' or ''on trial,'' or '' on satisfaction,'' the words meaning practically the same thing, there is, in such case, as a general thing, no present sale. The approval or satisfaction of the buyer is a condition precedent to the vesting of the property as upon a completed sale. In all these cases, however, the intention of the parties governs. That intention must be shown from the terms of the contract and the surrounding circumstances. The language used by them is not conclusive, but must be considered in the light of the surrounding circumstances at the time the contract is made.

Any exercise of dominion over the goods by the buyer which is inconsistent with the right to return them to the

(12) Cooley, J., in **Lingham v. Eggleston, 27 Mich., 324.**

seller will put an end to such right, as by selling the goods or using them in a way which prevents returning them in the same state in which they were delivered to him. If the property has passed to the buyer, though he has the right to rescind the sale and return the goods, all the incidents of ownership attach to them. They are at his risk of loss or damage, they are subject to seizure by his creditors, they are taxable as his goods, and all rights of the seller over them are gone, unless by some special agreement, in which case the rights of the seller arise from and are dependent upon the special agreement alone.

§ 62. **Same: Contract to sell unascertained goods. Assent to appropriation to the contract.** In Rule 4, we are dealing with the case of a "contract to sell," where the property in the goods is to pass at some time subsequent to the agreement. Obviously, the property in the goods cannot pass until particular goods are appropriated to the contract. But appropriation alone is not sufficient. There must be an assent to the appropriation on the part of both the buyer and the seller. In Moody v. Brown (13) there was a contract for stereotype plates, which the seller carried to the store of the buyer, who refused to take them. The seller left them there against the remonstrance of the buyer. It was held that the property in the plates did not pass to the buyer. The buyer might be liable in an action for damages, as for a breach of contract, but, until the buyer accepted the goods, property therein could not vest in him. That is

(13) 34 Maine, 107.

true even where goods are sold by sample and goods conforming to the sample are appropriated to the contract. There must be an assent to the appropriation of the goods. Here again there might be a cause of action based upon the contract itself for not accepting the goods (14).

The assent may be implied from the words or conduct of the buyer, as where goods were appropriated to the contract and the buyer upon being notified merely said that "he would take them away as soon as he could" (15), or where the buyer promised to pay a certain price for the goods (16), or where the purchaser requested the vendor "to take care of it, until he sent for it" (17). The assent may be given before the appropriation is made. In Langton v. Higgins (18) there was a purchase of a year's crop of peppermint oil. The buyer sent his bottles to be filled. The property passed when the bottles were filled, the assent in that case being before the appropriation was made. "When a vendee sends his ship, or cart, or cask, or bottle to the vendor, and he puts the article sold into it, that is a delivery to the vendee." The assent is obviously given before the appropriation is made.

§ 63. **Same: Delivery of appropriated goods to buyer or bailee.** When the goods are delivered to the buyer, there is a presumption that the seller unconditionally appropriates the goods to the contract, except where the

(14) Atkinson v. Bell, 8 B. & C., 277.
(15) Rohde v. Thwaites, 6 B. & C., 388.
(16) Goddard v. Binney, 115 Mass., 450.
(17) Wilkins v. Bromhead, 2 M. & G., 963.
(18) 4 H. & N., 402.

seller reserves the right of property in the goods until certain conditions have been fulfilled. A delivery to a carrier or other bailee is a delivery to the purchaser. In Fragano v. Long (19) the buyer at Naples sent an order to the sellers at Birmingham, "to dispatch to him certain goods, on insurance being affected; terms, three months' credit from the time of arrival." The sellers sent the goods by canal to Liverpool, and effected an insurance as goods of the purchaser. The goods were delivered by the sellers for shipment to Naples to the owners of a vessel, through whose negligence they were damaged. It was held that the property in the goods vested in the purchaser at the time they were dispatched from Birmingham and that the purchaser was entitled to sue for the injury to the goods. It is obvious that the goods must be those called for by the contract. The seller cannot appropriate beans where the contract calls for peas. Where the goods are sent "C. O. D." the carrier is not to deliver the goods until the buyer pays the price. This is no exception, however, to the rule that the property in the goods passes to the purchaser upon delivery to the carrier (20). The carrier is the agent of the seller for the collection of the purchase money, a vendor's lien being retained, until the purchase price is paid, but the title passes to the buyer.

Of course, as between the parties, the seller may re-

(19) 4 B. & C., 219.

(20) Commonwealth v. Fleming, 130 Pa. St., 138; *contra*, State v. O'Neil, 58 Vt., 140.

serve the title until the price is paid, even after delivery to the buyer.

§ 64. **Same: Delivery to be made by seller.** If the seller undertakes to deliver the goods at a particular place (Rule 5), the property in the goods does not pass until they reach that place. In McNeal v. Braun (21) there was a sale of a quantity of coal to be delivered at Burlington. A part of the coal sank at Burlington, before being unloaded. It was held that the property had not yet passed to the buyer. The carrier in this case was the agent of the seller, and the property did not pass until the coal was unloaded at the point of destination.

§ 65. **Reservation of right of possession or property when goods are shipped: Sales Act.** "1. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may thus be reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer. 2. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the pur-

(21) 50 N. J. Law, 617.

pose of securing performance by the buyer of his obligations under the contract. 3. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer. 4. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is endorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored: *provided,* that such purchaser has received delivery of the bill of lading endorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful'' (22).

§ 66. **Same: Conditional sales.** It is a common practice to sell goods, especially such as furniture, machinery, and sets of books, upon the terms that payments shall be made upon the purchase price at stated times, and upon condition that the property in the goods shall be retained by the seller until the last payment is made.

(22) Sales Act, sec. 20.

Sometimes the contract is made in the form of a lease, the payments to be made as "rent" until the last payment is made, upon which the property shall pass to the purchaser. The courts are not agreed upon the construction to be put upon such contracts. The payments cannot be rent and also payments upon the price of the goods at the same time. The transaction is intended as a sale and the purchaser is bound by his contract to make all the payments. Upon the purchaser making default in the payments the seller may retake the property, thus disaffirming the sale, or he may bring suit for the purchase price, thereby affirming the sale, but he cannot do both (23). If the seller reclaims the property, upon a default in payment by the buyer, he is not entitled to any further payments. It seems that the real nature of such transactions is a sale with reservation of title in the seller, as security for the purchase money, in which case it is necessary in most states by statute that the agreement be acknowledged and recorded as a chattel mortgage, otherwise the purchaser having possession can pass the property in the goods to a purchaser for value who has no notice of the secret lien upon the goods.

§ 67. **Same: Nature of bill of lading.** A bill of lading, sometimes spoken of as a "document of title," or a "symbol of property," is a receipt issued by a carrier for goods delivered to him to be carried and delivered to the person named as the consignee or his assigns. They were first issued by masters of vessels, but they are now issued by railroads, and the same principles

(23) Bailey v. Hervey, 135 Mass., 172.

apply. The master of the vessel ordinarily issues three bills of lading. One is retained by the master himself, another by the consignor, and the other is sent to the consignee. As a general rule, where goods are ordered to be shipped by a carrier, although they are to be selected by the vendor, the property in the goods passes to the purchaser upon such delivery to the carrier. But, where bills of lading are issued by the carrier, the carrier, upon delivery of the goods to him, becomes a bailee of the goods for the person to whom they are deliverable, under the bills of lading, which is the documentary evidence of the property in the goods. On receipt of it, the consignee acquires a property in the goods, which can only be defeated by the exercise of the unpaid seller's right of stoppage in transitu, the right of retaking the goods in case of the insolvency of the purchaser.

§ 68. **Same: Bill of lading making goods deliverable to seller.** The consignor may take bills of lading in which he is named the consignee, in which case he retains control over the goods until he assigns the bill of lading over. This is true even though the goods are shipped upon a vessel which belongs to the purchaser. In Turner v. Trustees (24) a cargo of cotton was sent from Charleston to Liverpool, on the homeward run of the buyers' vessel. A bill of lading was taken in which the cotton was "to be delivered at Liverpool unto order or to our assigns, paying freight for cotton nothing, being owners' property." It was held that the property did not vest in the buyers, notwithstanding the delivery upon their ship,

(24) 6 Ex., 543.

for by the terms of the bill of lading the sellers retained control of the property, even though the ship captain, in signing the bills acknowledging the cotton as deliverable to the sellers, may have exceeded his authority in so doing. Having the complete control over the goods, the consignor may transfer them to a third person, although in so doing he may make himself liable to the purchaser for a breach of contract (25).

If the goods are delivered upon the vessel as the goods of the purchaser, the property in the goods passes to the purchaser by such delivery, and the property having vested, the subsequent issue of the bills of lading is inoperative (26). If the shipper has done anything to divest himself of the property in the goods, he cannot regain that property in himself by having bills of lading subsequently issued to his own order.

Where the bill of lading is taken to the order of the vendor and the vendor keeps it in his own or in his agent's hands, this preserves in him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee offers to fulfill the conditions and demands that the bill of lading be handed over. Such a hold on the goods, retained under the bill of lading, is not merely a right to retain possession until those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default (27).

(25) Wait v. Baker, 2 Ex., 1.

(26) Ogle v. Atkinson, 5 Taunton, 759.

(27) Ogg v. Shuter, 1 C. P. D., 47.

If the bill of lading is taken deliverable to the order of the shipper, the intention being that the shipper shall retain complete control over the goods, he may prevent the purchaser from ever acquiring any property in the goods. If, however, the vendor retains the bill of lading merely in order to secure the payment of the purchase money, as when the bill of lading is forwarded with a bill of exchange attached, with directions that the bill of lading be delivered up to the purchaser upon acceptance or payment of the bill of exchange; until the acceptance or payment of the bill of exchange, the property in the goods remains in the vendor, but upon payment or tender by the purchaser of the contract price, the property in the goods vests in him. The seller here retains possession of the goods as security for the payment of the price only. The property in the goods, aside from being retained for the purpose of security, is vested in the buyer (28). This is the meaning of the latter part of clause 2 in the section of the Sales Act, quoted in § 65, above.

§ 69. **Same: Seller's retention of bill of lading to order of buyer.** Where the goods are shipped and by the bill of lading are deliverable to "the order of" the buyer, it cannot be known to the carrier who is entitled to receive the goods until the bill of lading is presented. The word "order" here means the same as it does in a negotiable note. If, however, the word "order" is not used, but the goods are "billed straight," it is customary for railroads to deliver up the goods to the consignee, without requiring the surrender of the bill of lading.

(28) Mirabita v. Imperial Ottoman Bank, 3 Ex. Div., 164.

The carrier, in such case, fulfills the contract under which the shipment is made, if the goods are delivered according to its terms. An unconditional delivery of the goods to the carrier, consigned to the buyer, even though a bill of lading be taken, if there is nothing to control the effect of it, will vest the property in the buyer (29).

But by taking the bill of lading to the "order of" the buyer, the seller may retain the right to the possession of the goods as long as he retains possession of the bill of lading (clause 4 of section 20 of Sales Act, quoted in § 65, above). If the buyer gets possession of the bill of lading without the consent of the seller, who is thus retaining a lien upon the goods, he is not entitled to possession of the goods, and even an innocent purchaser for value without notice gets no better right (30).

§ 70. **Same: Bill of lading with draft on buyer attached.** The bill of lading is often sent forward with a bill of exchange drawn upon the buyer attached thereto. They may be sent to an agent of the seller, with instructions to deliver the bill of lading to the buyer upon his acceptance or payment of the bill of exchange; or the bill of exchange, with the bill of lading attached, may be discounted by the seller's own bank, or deposited therein for collection, in which case the bank forwards them to its correspondent bank, at the place of consignment of the goods or residence of the buyer, for the same purpose and with like instructions; or the bill of exchange with the bill of lading attached may be sent directly to the buyer.

(29) Wigton v. Bowley, 130 Mass., 252.

(30) Shaw v. Railroad Co., 101 Mass., 557.

In the first two cases, the transfer of the bill of lading to the buyer and the vesting of the property in him are conditional upon his acceptance of the bill of exchange. "When the consignor sends the bill of lading to an agent . . . to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee, that . . . indicates an intention that the handing over of the bill of lading and the acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction" (31).

In the third case, where the documents are transmitted directly to the buyer, he may, by means of the bill of lading, get possession of the goods without accepting the bill of exchange, and may transfer the property therein to a purchaser without notice of the circumstances under which the goods have been obtained. As between the seller and the buyer, the transfer of the property, the possession of which the buyer may obtain by means of the bill of lading, is conditional upon the acceptance of the bill of exchange. The principle is expressed in clause 4 of the section of the Sales Act, quoted in § 65, above.

§ 71. **Sale by auction.** "In the case of a sale by auction: 1. Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale. 2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid;

(31) Cockburn, C. J., in Shepherd v. Harrison, L. R. 4 Q. B. 493.

and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve. 3. A right to bid may be reserved expressly by or on behalf of the seller. 4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer''(32).

These are well established principles.

§ 72. **Risk of loss.** ''Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that: (a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery. (b) Where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault'' (33).

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(32) Sales Act, sec. 21.

(33) Sales Act, sec. 22.

As a general rule, the loss follows the title. When it can be shown that the property has passed, the risk of loss is prima facie upon the person in whom the property is vested. On the other hand, when the risk of loss can be shown to be on either party, it is evidence that the property in the goods is in him. But here, as is the general rule, the intention of the parties is what governs. The parties may agree that though the property is in one the risk of loss shall be on the other; as in Martin v. Kitching (34), where it was expressly stipulated that the goods should be "at seller's risk two months."

In a conditional contract, such as where the goods are delivered to the buyer on the agreement that the property shall not pass until the price is fully paid, the risk is upon the buyer from the time of the delivery. In Tufts v. Griffin (35) there was a sale of a soda fountain, the price to be paid in installments. The soda fountain was delivered to the purchaser and used by him. Some of the payments had been made, but before the others were due the fountain was destroyed by fire, without negligence on the part of the purchaser and before any default in the payments. By the terms of the sale, the property was not to pass to the purchaser until the price had been fully paid. It was held that the purchaser must bear the loss, and that the fact that the property had been destroyed before the time for the last payment, on the making of which only his right to the property would have accrued, did not relieve him of the payment of the price

(34) L. R. 7 Q. B., 436.
(35) 107 N. C., 47.

agreed upon. "The transaction was something more than an executory conditional sale. The seller had done all he was to do, except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay. . . . The contract . . . imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties instead of enforcing the one made, which it cannot do" (36).

Section 2. As Against Third Parties.

§ 73. Sale by a person not the owner. "1. Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. 2. Nothing in this act, however, shall affect: (a) The provisions of any factors' acts, recording acts, or any act enabling the apparent owner of goods to dispose of them as if he were the true owner thereof. (b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction" (37).

As a general rule a purchaser of property takes only such title as his seller has or is authorized to transfer, and can acquire no other or greater interest. The owner

(36) Ibid, pp. 50-51.
(37) Sales Act, sec. 23.

of goods may recover them from one who has purchased them from a thief or a finder or anyone entrusted with possession as a mere bailee.

§ 74. **Same: Owner estopped by conduct.** The owner may, however, by his conduct, preclude himself from denying the seller's authority to sell. If A stands idly by and sees B sell his (A's) goods to C, and C part with the purchase money, A by his conduct precludes himself from later asserting his ownership. "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time" (38). In Spooner v. Cummings (39) the owner sold a horse to one Pope with the understanding that title was not to pass until the price was paid. Pope sold the horse to a third person. It was shown that for some time the owner, who was a horse dealer, and Pope had engaged in similar transactions, Pope purchasing the horses upon similar conditional agreements. Pope before paying for them, would resell the horses and send the money to the owner, which he would apply as he saw fit on any of the agreements. It was rightly held that from the course of dealing Pope had implied authority to sell the horse in question. It was said to be immaterial whether Pope had actual authority to make the sale or it depended upon

(38) Lord Denman in Pickard v. Sears, 6 A. & E., 469.
(39) 151 Mass., 313.

facts which estopped the owner from denying the validity of the sale.

The mere transfer of possession alone will not work such an estoppel.

§ 75. **Same: Sales by factors.** A factor is a person to whom goods are consigned for sale. He has possession of the goods and may sell them in his own name. He may sell the goods on credit. He has a lien on the goods for advances made by him upon the goods and for the balance of the general account between him and his principal. The principal cannot restrict the authority of the factor, as to anyone who has no notice of the restrictions. At common law the factor could not pledge the goods for advances to himself (40). "Factor's acts" have been passed in England and in some states in the Union, viz., Maine, Massachusetts, Rhode Island, New York, Pennsylvania, Maryland, Ohio, and Wisconsin. By these statutes the authority of the factor is considerably extended. He may, for example, pledge the goods for advances, and persons who advance money in good faith on the security of the goods or documents of title, in reliance upon the possession of the goods or documents of title as proof of authority, are protected, if the goods or documents of title were voluntarily entrusted to the factor by the owner for the purposes specified in the statutes.

§ 76. **Sale by one having a voidable title.** "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods; *provided,* that he buys

(40) Paterson v. Tash, 2 Strange, 1178.

them in good faith, for value, and without notice of the seller's defect of title" (41).

In Rowley v. Bigelow (42) one Martin fraudulently purchased corn at New York, pretending to purchase it for cash, when he was insolvent, and shipped it to Boston to purchasers, to whom the bill of lading was sent. The purchasers accepted a draft for the price and paid it at maturity. They purchased the corn with no notice of Martin's fraud. It was held that they obtained a good title. Where a sale of goods is obtained by fraud on the part of the purchaser, the transaction is not void but voidable and title vests in the purchaser until the defrauded vendor rescinds the transaction and reclaims the goods. If, however, before rescission, the goods have been sold to a purchaser without notice of the fraud, he obtains an indefeasible property in the goods. The same is true where the sale is made by an owner to defraud his creditors. The rule as above stated in the Sales Act will prevent an infant or insane person from avoiding a sale, where the goods have been transferred by the purchaser to a subsequent purchaser. Compare § 7, above.

§ 77. Sale by seller in possession of goods already sold. "Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the

(41) Sales Act, sec. 24.

(42) 12 Pickering, 307.

same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same" (43).

As between the seller and the buyer, a delivery of the goods is not essential for the completion of a sale. In an executed sale, the buyer becomes vested with the property in the goods, although the possession is still retained by the seller. The continued possession of the seller, however, is an easy and frequent means of fraud upon later purchasers and upon creditors of the seller. The above provision of the Sales Act is in accordance with the doctrine of the case of Lanfear v. Sumner (44) where the doctrine was regarded as established that the delivery of possession is necessary in a conveyance of personal chattels, as against everyone but the vendor, and, when the same goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires the possession of the goods will hold them against the other. The vendee must not only take possession, but it must be exclusive of the vendor. Concurrent possession will not be sufficient, but there must be a delivery, either actual or constructive, according to the circumstances of the case. If the property is incapable of manual delivery, such as the furniture in a large hotel, heavy articles, or crops in the field, a change of actual possession is not necessary, but some act must be done by the buyer which indicates that there has been a transfer of property in the goods,

(43) Sales Act, sec. 25.

(44) 17 Mass., 110.

some evidence to show that the purchaser asserts his ownership over the goods or acts in a way inconsistent with the property rights of the vendor (45).

In many states there is no absolute rule of law that the seller must give possession to the buyer in order to pass a title good against later innocent purchasers from the seller, but the continued possession of the seller must be explained so as to negative fraud, just as in the case of attaching creditors of the seller. See § 78, following.

§ 78. Creditor's rights against sold goods in seller's possession. "Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void" (46).

Where a sale is made and possession of the goods or of negotiable documents of title to the goods is fraudulently retained, i. e., where the fraud is established, the sale may be avoided by the creditors of the seller. What is necessary to constitute fraud is not a question in the law of sales, and is a question upon which decisions differ in the different states. The continued possession of the seller has been treated by different courts as either conclusive evidence of fraud; or as establishing a presumption which may be defeated by other evidence; or as merely evidence, not sufficient to establish a presumption

(45) McKibbon v. Martin, 64 Pa. St., 352; Morton v. Ragan, 68 Ky., 334; Kellogg Newspaper Co. v. Peterson, 62 Ill., 158.

(46) Sales Act, sec. 26.

but for the jury to consider under all the circumstances of the case, in determining whether or not the retention of possession by the seller has been fraudulent.

§ 79. Sale by buyer in possession under conditional sale. Creditors' rights. As between buyer and seller, as has been said (§ 63, above), the seller may preserve the right of possession or property until the price is paid or secured, in which case the payment or securing of the price is a condition precedent to the passing of the property, even though there has been a delivery to the buyer. The same is generally held, in the absence of statute, as against innocent purchasers from the conditional buyer in possession. Giving the buyer possession under a conditional sale is not such conduct as to estop the seller against purchasers, nor of course against the buyer's creditors. In Harkness v. Russell (47) there was an express condition in each of the notes, upon the sale of two engines and boilers and a saw-mill, for the purchase price of which notes were given, "that the title, ownership or possession of said engine and saw-mill does not pass from the said Russell & Co. (vendors) until this note and interest shall have been paid in full, and the said Russell & Co. or his agent has full power to declare this note due and take possession of said engine and saw-mill when they may deem themselves insecure, even before the maturity of this note." It was held that this was a conditional sale and the rights of the seller were valid against third persons as well as the parties to the transaction.

In a few states the rule is otherwise, without a statute,

(47) 118 U. S., 663.

and in over two-thirds of the remaining states there is a statutory requirement that conditional sales be recorded to give them validity against innocent purchasers, and, in many cases, the buyer's creditors.

§ 80. **Documents of title: At common law.** Upon the negotiation of a bill of exchange or promissory note, which are commonly called negotiable instruments, the holder for the time being has a right of action in his own name against the promisor, though wholly unknown to him; and, if he is a purchaser for value without notice, his right of action is not subject to defects in the title of a previous holder, or to personal defenses which would be good against a previous holder. See the article on Negotiable Instruments in Volume VII of this work.

A bill of lading is not negotiable, as the term is used in regard to bills of exchange and promissory notes. If the consignee assigns a bill of lading to a holder for value, the assignment transfers the right to the specific goods, and this to a certain extent wider than that possessed by the assignor; e. g., the assignee has a right to the goods, which overrides the seller's right of stoppage in transitu, and he can claim the goods in spite of the insolvency of the consignee; but the assignment transfers a right to specific goods, a right in rem, while the negotiation of a negotiable instrument transfers a right in personam against the persons liable. The assignee of a bill of lading acquires no rights independently of those of the assignor. A purchaser for value without notice of a stolen bill of lading does not acquire title to the goods against the true owner, and, wherever a bill of lading

is transferred without the authority of the person really entitled, even a bona fide indorsee acquires no rights. The assignment of a bill of lading can give the assignee no better title than is possessed by the assignor, except that he may take the goods freed from the seller's right of stoppage in transitu.

§ 81. Negotiable documents of title under Sales Act. Mercantile custom tends to give a certain negotiable character to documents of title issued by bailees like carriers or warehousemen, by which they promise to deliver goods "to bearer" or "to the order" of persons named. This custom has in the main received little encouragement from the courts, and even statutes enacted to give effect to such customs have frequently been so narrowly construed as to nullify their intentions (48). The Sales Act (sections 27 to 40) codifies such legislative efforts of this character as have been already made, and extends them so as to enact into a harmonious whole the substance of mercantile understanding and usage respecting such documents. The gist of these provisions is that documents making goods deliverable "to bearer" or "to order" are made negotiable and may be transferred by delivery or by indorsement, according to their tenor, like negotiable instruments for the payment of money; *except*, that they may be thus negotiated only by their real owner, or by some person entrusted with their possession by the owner. A thief or finder thus can pass no title to such documents.

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(48) Shaw v. Railroad Co., 101 U. S., 557.

CHAPTER VI.

PERFORMANCE OF THE CONTRACT.

§ 82. Seller must deliver and buyer accept goods. "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale" (1).

The delivery may be *actual,* a manual or physical handing over of the goods themselves, or *constructive,* which is the legal equivalent of actual delivery, by some act which clearly indicates the intention of the parties to transfer the right of possession. A delivery to an agent of the buyer is a delivery to the buyer, e. g., delivery to a carrier for transportation to the buyer, the carrier being the agent of the buyer, for that purpose. Where goods are in the possession of a bailee, a notice of the sale, given to the bailee, is a constructive delivery. The delivery may be symbolical, as by the transfer of something which is intended to represent the goods, e. g., bills of lading, warehouse receipts, and so forth.

§ 83. Delivery and payment are concurrent conditions. "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price,

(1) Sales Act, sec. 41.

and the buyer must be ready and willing to pay the price in exchange for possession of the goods'' (2).

The parties may agree upon the time of delivery and the time of payment. Where credit is given, the buyer is entitled to possession of the goods and the seller is entitled to the purchase money, either on demand or at the time stated in the agreement for credit. In the case of a contract of sale for cash on delivery, ''if the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods'' (3). Where goods, sold for cash or notes on delivery, are delivered without the cash or notes being given or demanded, the presumption is that the condition has been waived and that the property in the goods has passed to the purchaser; but this presumption may be rebutted by evidence of the declarations or acts of the parties and the surrounding circumstances, which show the intention that the delivery should not be considered complete until performance of the condition (4).

§ 84. **Place, time, and manner of delivery.** ''1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the

(2) Sales Act, sec. 42.

(3) Bellows, C. J., in Paul v. Reed, 52 N. H., 136.

(4) Parker v. Baxter, 86 N. Y., 586.

contrary, the place of delivery is the seller's place of business, if he have one, and if not, his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery. 2. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. 3. Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall effect the operation of the issue or transfer of any document of title to goods. 4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact. 5. Unless otherwise agreed, the expenses of and incident to putting the goods into a deliverable state must be borne by the seller" (5).

These provisions of the Sales Act are well established rules of law. If no place of delivery is specified in the contract, the articles sold must, in general, be delivered at the place where they are at the time of the sale, unless some other place is required by the nature of the article,

(5) Sales Act, sec. 43.

or by the usage of the trade, or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case (6). Where the goods are manufactured for the buyer, the place of manufacture is the place of delivery (7). The store of a merchant, or other place where the goods are usually kept, is the place of delivery. The parties may agree upon any manner of delivery, such as by delivering the key to a trunk or warehouse. Where the goods at the time of the sale are in the possession of a third person, he becomes a bailee for the buyer from the time he receives notice of the sale. He may, of course, terminate the bailment at any time by refusing to keep possession for the buyer, but he can not prevent the sale from taking effect, and, as long as the goods are in his possession, he is a bailee for the real owner, whoever he may be.

§ 85. **Delivery of wrong quantity.** "1. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received. 2. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the

(6) Hatch v. Oil Co., 100 U. S., 124.

(7) Goddard v. Binney, 115 Mass., 450.

buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate. 3. Where the seller delivers to the buyer the goods which he contracted to sell, mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. 4. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties'' (8).

It is the duty of the seller to deliver the exact quantity sold. The condition is broken by the delivery of a larger quantity as well as by a delivery of a quantity less than that sold. ''The delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him. . . . The delivery of more than ten is a proposal for a new contract'' (9). The buyer may accept the amount tendered, in which case he assents to the substituted performance for that required by the terms of the contract. The same principles apply when the seller delivers goods mixed with goods of a different description not included in the contract.

That these principles are subject to any usage of trade,

(8) Sales Act, sec. 44.

(9) Parke, B., in Cunliffe v. Harrison, 6 Ex., 903, 906.

special agreement, or course of dealing between the parties, is in accordance with the rule that, "where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or sale" (10). A custom, to bind the parties to a contract, must not be inconsistent with the terms of the contract and must be consistent with the general rules of law. It must be known to both the contracting parties or be so well established in the locality or in the line of trade that the parties may be taken to have contracted with reference thereto (11).

§ 86. **Delivery by instalments.** "1. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. 2. Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise

(10) Sales Act, sec. 71.

(11) Barnard v. Kellogg, 10 Wallace, 383.

to a claim for compensation, but not to a right to treat the whole contract as broken'' (12).

Sometimes an agreement to accept delivery of the goods by instalments is implied from the nature of the goods or other circumstances, as in a purchase of a large amount of hay or coal or lumber; but if such goods are to be delivered at a stated time, there must be a delivery of the last instalment by the stated time. Sometimes one party to a contract claims to be discharged from performance on his part by the fact that the other party has failed to perform, either wholly or to such an extent as to defeat the object for which the contract was made. Where there is a contract to sell goods to be delivered and paid for by instalments, whether a default, either in making delivery or making a payment, discharges the contract, or merely gives rise to an action for damages, is a question of fact depending upon the circumstances of each case. It is the generally accepted doctrine that such contracts are entire; that the provisions as to delivery of the goods by stated instalments, which are to be separately paid for, do not render the contract divisible, and that where the seller fails to deliver one instalment, the buyer has the right to rescind the contract (13). A different conclusion was reached in Gerli v. Poidebard Silk Mfg. Co. (14). The court there held that a failure to deliver the

(12) Sales Act, sec. 45.

(13) Hoare v. Rennie, 5 H. & N., 19; Norrington v. Wright, 115 U. S., 188 (in which there is a full review of the English and American cases).

(14) 57 N. J. Law, 432.

first instalment stood on the same footing as a failure to deliver any subsequent instalment.

Where the payments are to be made by instalments, a default in a payment excuses further performance by the other party (15). The party not in default may refuse to deliver any more goods and recover for those already delivered. He may not recover for loss of profits on the balance of the contract, which he elects not to perform (16). If the instalments are numerous and extend over a considerable period of time, a default either of delivery or payment would not appear to discharge the contract, although it would give rise to an action for damages. In Honck v. Muller (17) 2,000 tons of iron were to be delivered in three monthly instalments. It was held that upon a failure of the buyer to accept any during the first month the seller was discharged from the contract.

§ 87. **Delivery to a carrier on behalf of the buyer.** "1. Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section nineteen, Rule 5 (18), or unless a contrary intent appears.

(15) Rugg v. Moore, 110 Pa. St., 236.

(16) Keeler v. Clifford, 165 Ill., 544.

(17) 7 Q. B. D., 92. See also Simpson v. Crippin, L. R. 8 Q. B., 14; Freeth v. Burr, L. R. 9 C. P. 208.

(18) By which it is provided: "If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages. 3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit'' (19).

The carrier is ordinarily the agent of the buyer, for the transmission of the goods to the buyer. If, by the contract, the seller is to deliver the goods at a particular place, as at the buyer's residence or place of business, the carrier is in that case the agent of the seller, and delivery to the carrier is no delivery by the seller. It is the duty of the seller to use due care in packing and shipping the goods. In Diebold Safe and Lock Co. v. Holt (20), according to the agreement the seller was to deliver the safe on board the cars at the place of shipment. The safe was crated and fastened near a bolt or bolts which protruded from the side of the car, and by rubbing against this bolt or bolts, holes were produced during the transit

(19) Sales Act, sec. 46.

(20) 4 Okla., 479.

of the safe. It was held that the seller was responsible for the damage occasioned thereby, and that the seller had not discharged its whole duty by placing the safe on board the cars.

§ 88. **Right to examine the goods.** "1. Where goods which he has not previously examined are delivered to the buyer, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. 2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. 3. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words 'collect on delivery', or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of an agreement permitting such examination" (21).

There is not a valid tender of goods by a delivery or offer to deliver closed casks said to contain them; but they should be tendered in such a way that the buyer may have a reasonable opportunity of inspecting them, and of ascertaining whether what he has bargained for

(21) Sales Act, sec. 47.

is presented for his acceptance (22). In Doane v. Dunham (23) where it was shown to be the well established custom of trade, among wholesale dealers in standard powdered sugar in Chicago, to handle the same in original packages, with no examination as to quality or condition upon purchase or sale thereof, it was held that purchasers, who dealt pursuant to the custom, were not liable for the price of sugar purchased by them and damaged by fire after delivery, if the sugar were shown to have been caked and not in the condition contemplated by the parties, and if, as soon as they found out that it was damaged when sold, they offered to return it and notified the seller to take it away and he neglected so to do. Where an article is one which must be used before its quality can be ascertained, it is the right of the purchaser to make use of so much thereof as, under all the circumstances, may become actually necessary for that purpose, without liability for the same if it fails, in the test, to fulfill the contract (24). Where goods are sent by express and the buyer is, by the terms of the contract, to pay the price to the express company, by whom it is to be remitted to the seller, the buyer is not entitled to inspect the goods before payment of the price (25).

§ 89. **What constitutes acceptance.** "The buyer is deemed to have accepted the goods when he intimates

(22) Isherwood v. Whitmore, 11 M. & W., 347.
(23) 79 Ill., 131.
(24) Philadelphia Whiting Co. v. Detroit Lead Works, 58 Mich., 29.
(25) Wiltse v. Barnes, 46 Iowa, 210.

to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them'' (26).

In Lyon v. Bertram (27) there was a sale of a cargo, about 2,000 barrels of Haxall flour. A part was delivered and paid for and sold by the buyer to customers. The flour proved to be of another brand, plainly marked on each barrel, but of the same grade and value as Haxall. The buyer, having used the goods as owner by reselling a part of them, put it out of his power to rescind the contract. The buyer accepts the goods when he manifests his assent to the passing of the property to himself or when he acts toward the goods in a manner consistent only with ownership in himself, as by a resale, by consuming them, or by retaining the goods an unreasonable length of time without rejecting them.

§ 90. **Acceptance does not bar action for damages.** ''In the absence of an express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought

(26) Sales Act, sec. 48.
(27) 20 Howard, 149.

to know of such breach, the seller shall not be liable therefor'' (28).

This is in accordance with a simple doctrine in the law of contracts, that where one party to the contract performs only partially or in a manner inferior to that demanded by the terms of the contract, the other party may rescind the contract altogether, or he may accept the partial or defective performance and hold the other party liable in damages for his default. If, after acceptance of the part or defective performance, the party not in default fails to make any claim upon the other party within a reasonable time, he is deemed to have waived any cause of action for the other party's default. The above provision of the Sales Act is simply an application of that principle to a contract of sale. The buyer may accept the goods and hold the seller liable for damages on account of failure to deliver the entire quantity contracted for, or for supplying goods of an inferior quality, or for not delivering the goods within the required time.

§ 91. **Buyer is not bound to return goods wrongly delivered.** ''Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them'' (29).

In such case, the buyer has possession of the goods as a bailee and is under the obligations of a bailee in re-

(28) Sales Act, sec. 48.
(29) Sales Act, sec. 50.

gard to the care and custody of the goods. He may have the goods stored at reasonable expense, at the expense of the seller, and, in some cases, may sell the goods for the benefit of the seller, as in the case of perishable goods. The buyer must act in good faith and with a view to saving the seller as much loss as possible.

§ 92. **Buyer's liability for failing to accept delivery.** "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default" (30).

It is not only the duty of the seller to deliver the goods according to the terms of the contract, but it is also the duty of the buyer to accept such delivery at the time called for by the contract or within a reasonable time, and, upon failure, he is liable for his breach of contract, and the damages will be assessed according to the injury inflicted upon the seller—such damages as may fairly and reasonably be considered either arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made

(30) Sales Act, sec. 51.

the contract, as the probable results of the breach of it (31). See the article on Damages in Volume X of this work. A reasonable charge for warehouse room is within the rule (32).

If the property in the goods has not passed, the seller is not entitled to compensation for the care and custody of his own goods. His only remedy is upon the breach of contract, and he has but one cause of action. In Pakas v. Hollingshead (33) there was a sale of 50,000 pairs of bicycle pedals, to be delivered in instalments. After about 2,600 were delivered, the seller failed to make further delivery. When about 19,000 pairs should have been delivered, according to the contract, the buyer sued for damages for the failure to deliver that number and recovered in his action. After the time when the entire contract should have been performed, according to its terms, the buyer sued for the breach of the entire contract, or the failure to deliver the instalments subsequent to those for the failure to deliver which the former suit was brought. It was held that the former action barred the buyer from further recovery. The buyer should have treated the failure to deliver, after the first instalments were delivered, as an entire breach of the contract. The seller is not to be harassed by successive suits for successive partial breaches.

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(31) Hadley v. Baxendale, 9 Ex., 353.

(32) Greaves v. Ashlin, 3 Campbell, 426.

(33) 184 N. Y., 211.

CHAPTER VII.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

§ 93. **Definition of unpaid seller.** "1. The seller of goods is deemed to be an unpaid seller within the meaning of this act: (a) When the whole of the price has not been paid or tendered. (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise. 2. In this part of this act the term 'seller' includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller" (1).

Where the property in the goods has passed to the buyer, the remedies of the seller are solely for enforcing the payment of the price. In Martindale v. Smith (2) there was a sale of a stack of oats standing on the ground of the seller on April 23d, to be paid for in 12 weeks, i. e. by July 16th, the buyer to be at "liberty to let the stack stand, if he sees fit, until the middle of August next." The buyer did not pay on the 16th of July, but requested

(1) Sales Act, sec. 52.

(2) 1 Q. B., 389.

time, which the seller refused to give, saying that as he had failed in the payment at the time appointed by the contract he should not have the stacks. Two or three days later, the buyer tendered the money, which the seller refused to accept, and on the 14th of August the buyer demanded the stacks, repeating the tender, which was refused. The seller afterwards sold the stacks and the buyer brought suit for a conversion of his property. It was held that he was entitled to recover. "The sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract. . . . . In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement." The seller's right to detain the thing sold is a right of lien till the price is paid, not a right to rescind the bargain. The seller does not lose his lien by the acceptance of payment of part of the price (3).

§ 94. **Receipt of negotiable instrument as payment.** Whether or not the receipt of a promissory note or draft or check is payment is a question of the intention of the parties. If intended as payment, there is a substitution of a new liability for the old one, and the buyer is discharged from his previous obligation for the price of the goods. The seller relies upon a new cause of action upon the instrument, and, if it be dishonored, cannot bring suit

(3) Hodgson v. Lay, 7 T. R., 436.

for the price of the goods. But the instrument may be accepted conditionally, the seller taking the negotiable instrument instead of immediate payment, but upon condition that if the negotiable instrument be dishonored at maturity, the seller shall be entitled to his original cause of action. As a general rule, the English and American courts hold that the presumption, in the absence of proof to the contrary, is that the instrument is taken conditionally. A few states hold that the presumption is that it is taken absolutely. But, in either case, if there is any evidence of intent the question becomes one of fact for the jury; if there is no evidence the presumption must control (4).

§ 95. **Remedies of an unpaid seller.** "1. Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has: (a) A lien on the goods or right to retain them for the price while he is in possession of them. (b) In case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them. (c) A right of resale as limited by this act. (d) A right to rescind the sale as limited by this act. 2. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer" (5).

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(4) Anson, Law of Contract (2d Am. ed.), 350, n. 1.

(5) Sales Act, sec. 53.

Where the property in the goods has not yet passed to the buyer, and the seller still has possession, the seller has full power to deal with the goods, so far as his disposition of them is concerned, having the possession coupled with the legal title. The adjustment of their rights and liabilities is merely a matter of contractual rights and obligations. Where the goods are still in the seller's possession, but the property therein has passed to the buyer, the seller may have one or more of the four remedies given above. They will be considered in order in the following subsections.

§ 96. **Unpaid seller's lien: When right of lien may be exercised.** "1. Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: (a) Where the goods have been sold without any stipulation as to credit. (b) Where the goods have been sold on credit, but the term of credit has expired. (c) Where the buyer becomes insolvent. 2. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer" (6).

In the absence of an agreement to the contrary, the seller is entitled to payment upon delivery of the goods to the buyer. He has, then, a lien upon the goods for the price, unless there is an express agreement to extend credit. Where the goods have been sold on credit, but the term of credit has expired, the seller in possession of the goods is still entitled to retain possession until the

(6) Sales Act, sec. 54.

price is paid or tendered. "When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent" (7).

Where the buyer becomes insolvent, the seller is entitled to retain possession, although the goods were sold on credit. One who contracts to sell goods on credit, thereby agrees to waive his lien for the purchase money; but he does so on the implied condition that the purchaser shall keep his credit good. If, therefore, before payment, and while the seller still retains possession of the goods, he discovers that the purchaser is insolvent, he may hold the goods as security for the price (8). Although the seller is in possession as agent or bailee for the buyer, yet such possession by the seller is actual possession, in which case he may exercise his right of lien.

§ 97. **Same: Lien after part delivery.** "Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery was made under such circumstances as to show an intent to waive the lien or right of retention" (9).

The lien attaches to every part of the goods for the full amount of the price. If a part of the goods have been delivered, the seller has a lien upon the goods, which

(7) Benjamin, Sales, s. 1227.

(8) Crummey v. Raudenbush, 55 Minn., 426.

(9) Sales Act, sec. 55.

remain in his possession, for the full amount of the price which remains unpaid.

§ 98. **Same: When lien is lost.** "1. The unpaid seller of goods loses his lien thereon: (a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof. (b) When the buyer or his agent lawfully obtains possession of the goods. (c) By waiver thereof. 2. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a judgment or decree for the price of the goods" (10).

A lien is effectual only while the lien-holder keeps possession. If he voluntarily relinquishes possession, his lien is lost. It may be retained by agreement, and, in that case, the lien is effectual at least between the parties. If the goods are delivered in the case of a sale for cash before the money happens to be paid, the seller may reclaim them if he acts promptly. Where the buyer obtains possession by a trick, the seller does not lose his lien (11).

§ 99. **Stoppage in transitu: Seller may stop goods on buyer's insolvency.** "Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become

(10) Sales Act, sec. 56.

(11) Ames v. Moir, 130 Ill., 582.

entitled to the same rights in regard to the goods which he would have had if he had never parted with the possession'' (12).

The right of stoppage in transitu is merely an extension of the right of lien which the seller has upon the goods for the price. The property vests in the buyer, upon the sale, but, where the price is to be paid upon delivery, the seller has a right to retain the goods till payment is made; and, where the goods are in the possession of a carrier for transportation to the buyer or to the place of delivery, if the buyer becomes insolvent, the seller may repossess himself of the goods, if he can do so while they are still in the hands of the carrier. This does not rescind the contract, but restores the seller's lien. The buyer may have become insolvent after the sale, or he may have been insolvent at the time of the sale, if that fact were unknown to the seller.

As to what constitutes insolvency, the common law rule is expressed in the Sales Act, as follows: ''A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not'' (13). It is sufficient, for the exercise of the right of stoppage in transitu, if the buyer is either in fact insolvent or if he has afforded the ordinary apparent evidences of insolvency. The seller

(12) Sales Act, sec. 57.

(13) Sales Act, sec. 76, Clause 3.

has the right, although he received the buyer's negotiable securities, and even though they have been negotiated and are still outstanding (14).

§ 100. Same: When goods are in transit. Sales Act. It is provided in the Sales Act: "1. Goods are in transit within the meaning of section fifty-seven (§ 99, above): (a) From the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee. (b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back. 2. Goods are no longer in transit within the meaning of section fifty-seven: (a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination. (b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer. (c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf. 3. If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier, or as agent of the buyer. 4. If

(14) Diem v. Koblitz, 49 Ohio St., 41.

part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods'' (15).

§ 101. **Same: Illustrations and comment.** The seller may exercise his right of stoppage in transitu at any time before the final delivery to the buyer or his agent. It must be some agent other than the carrier, who is, to be sure, the agent of the buyer for transporting the goods, and delivery to whom is taken as delivery to the buyer for the purpose of passing the property in the goods. As long as the goods are in the possession of the carrier, though the goods may be at the destination of the journey, this right exists. If, however, the carrier's possession as such has ceased, and he has become an agent or warehouseman for the buyer, the right is ended; the carrier by agreement holding the goods for the buyer, not as carrier, but as agent or on a new bailment (16).

If the original transit has ended and a new transit has begun, by the direction of the buyer, the right no longer exists. ''Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage in transitu exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor,

(15) Sales Act, sec. 58.

(16) Ex parte Cooper, 11 Ch. D., 68; Guilford v. Smith, 30 Vt., 49.

but are in transitu afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So, also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at end when they have reached that place, and any further transit is a fresh and independent transit'' (17). If the buyer obtains a delivery of the goods at a point before the goods have reached their destination, and before any order to stop is given, the right is ended (18). The right no longer exists where the goods have been taken from the carrier by a truckman, even though the truckman received the goods in accordance with the general authority of the consignee to receive all goods addressed to him (19).

§ 102. **Same: Who may stop goods, and subject to what claims.** The right of stoppage in transitu is personal to the seller. It cannot be exercised by his creditors, the property in the goods being in the buyer; but this right of the seller is paramount to any right of creditors of the buyer to attach the goods (20). It is subject to the lien of the carrier for the transportation of the goods, but paramount to any lien of the carrier, by agreement or custom, for a general balance. If part of the goods have been delivered, the seller may exercise the

(17) Bethell v. Clark, 20 Q. B. D., 615.

(18) Whitehead v. Anderson, 9 M. & W., 518.

(19) O'Neal v. Day, 53 Mo. App., 139.

(20) Blackman v. Pierce, 23 Cal., 508

right over the remainder, unless by agreement a delivery of part is intended as a delivery of the whole, and the carrier holds the balance of the goods in some other capacity, as the purchaser's agent or bailee (21).

§ 103. **Same: Effect of transfer of negotiable document of title.** "Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transit shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued the document, of the seller's claim to a lien or right of stoppage in transit" (22).

In Newhall v. Central Pacific R. R. Co. (23) goods were sold by a New York firm to a San Francisco firm and shipped by rail to the vendees as consignee, under bills of lading in the usual form, which were received by the consignees before the goods arrived. While the goods were in transit, the consignees became insolvent, and thereupon the vendors notified the railroad company that they stopped the goods in transitu. After the notice of stoppage in transitu was served upon the railroad

(21) Dickson v. Yates, 5 B. & Ad., 313; Kemp v. Falk, 7 App. Cas., 573.

(22) Sales Act, sec. 62.

(23) 51 Cal., 345.

company, the consignees indorsed the bills of lading to purchasers for value who had no notice that the consignees were insolvent or that any notice of stoppage in transitu had been served upon the railroad company. It was held that these subpurchasers were entitled to the goods on delivering up the bills of lading to the railroad company and payment of charges, and that the railroad company was liable for the value of the goods upon its refusal to deliver the same. This provision of the Sales Act is in accordance with that decision, that a purchaser for value without notice is to be protected, even though he buys subsequent to the insolvency of the consignee and subsequent to the notice of stoppage in transitu to the carrier.

The provision of the Sales Act restricting the operation of this principle to a transfer of a *negotiable* document of title is contrary to the English law, and perhaps that of some American states which recognize no distinction between negotiable and non-negotiable bills of lading.

§ 104. Same: Ways of exercising the right to stop. "1. The unpaid seller may exercise his right of stoppage in transit either by obtaining actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer. 2. When notice of stoppage in transit is

given by the seller to the carrier or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver, or be justified in delivering, the goods to the seller unless such document is first surrendered for cancellation'' (24).

This section of the Sales Act is merely a statement of the established rule, except the last sentence. The notice need not be in any particular form. If the notice is given to the agent or servant of the carrier, who has the actual custody of the goods at the time, such notice is sufficient. If the notice be given to the principal, he must use reasonable diligence to send the notice on to his agent or servant, who has actual custody of the goods, to prevent their delivery to the buyer. If the notice is given to the principal, to be effectual, it must be at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee (25).

§ 105. **Resale by the seller: Sales Act.** ''1. Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable

(24) Sales Act, sec. 59.

(25) Whitehead v. Anderson, 9 M. & W., 518, 533.

time, an unpaid seller having a right of lien or having stopped the goods in transit may resell the goods. He shall not thereafter be liable to the original buyer upon the contracts to sell or upon the sale, or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale. 2. Where a resale is made, as authorized by this section, the buyer acquires a good title as against the original buyer. 3. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or of the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made. 4. It is not essential to the validity of a resale that notice of the time and place thereof should be given by the seller to the original buyer. 5. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale" (26).

§ 106. Same: Illustrations and comment. All goods the value of which is likely to depreciate within a short time, are perishable. "If articles are not perishable, price is, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another. It is a practice therefore founded on good

(26) Sales Act, sec. 60.

sense to make a resale of a disputed article, and to hold the original contractor responsible for the difference'' (27). A disposal of the goods by the vendor, to prevent further loss on the buyer's refusal to receive them is not a rescission of the contract. ''The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. 1. He may store or retain the property for the vendee, and sue him for the entire purchase price. 2. He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such sale. 3. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price'' (28). The resale need not be by auction; any fair sale made in good faith according to established business methods, with no attempt to take advantage of the vendee, is all that is required (29). It is not essential that notice of the sale be given to the vendee, though failure to give notice may be evidence of bad faith on the part of the vendor. The vendor is entitled to deduct the expenses of the resale, but not to put in charges for his own services (30). If any profit, instead of a loss, is realized upon the resale, the seller is entitled to keep it as his own (31).

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(27) Maclean v. Dunn, 4 Bingham, 722.

(28) Earl, C., in Dustan v. McAndrew, 44 N. Y., 72, 78.

(29) Ackerman v. Rubens, 167 N. Y., 405.

(30) Penn v. Smith, 93 Ala., 476.

(31) Warren v. Buckminster, 24 N. H., 336.

§ 107. **Rescission by the seller.** "1. An unpaid seller having a right of lien or having stopped the goods in transit, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or of the sale. 2. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted" (32).

It has been shown above that the seller, by holding the possession of the goods or reclaiming them after the purchaser refuses to pay, does not thereby rescind the sale. He retains possession to enforce his lien as vendor (33). His election to rescind must be manifested by notice or some overt act, as by a sale of the goods or dealing with them in a manner inconsistent with the former buyer's right of property therein.

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(32) Sales Act, sec. 61.

(33) Ames v. Moir, 130 Ill., 582.

CHAPTER VIII.

ACTIONS FOR BREACH OF THE CONTRACT.

SECTION 1. REMEDIES OF THE SELLER.

§ 108. **Action for the price: Sales Act.** "1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods. 2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it. 3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section sixty-four, clause 4 (§ 110, below), are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer

that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller shall treat the goods as the buyer's, and may maintain an action for the price" (1).

§ 109. **Same: Illustrations and comment.** Where the property in the goods has passed to the buyer and the buyer wrongfully refuses to pay, it is obvious that the seller has an action for the price. If the property has not yet passed to the buyer, the seller's right to recover the price is not so clear. Where the buyer is at fault in not allowing the property to pass, it is the better doctrine that the seller may recover the price and vest title in the buyer even against the latter's will. In Bement v. Smith (2) the seller made a sulky for the buyer at an agreed price. When it was finished, the seller took it to the buyer's residence, but the buyer refused to receive it. The seller placed it with a third person and sued for the price. It was held that he could recover. One of the remedies which a seller has, against the buyer, upon his refusal to take and pay for the property, is to store or retain the property for the buyer, and sue him for the entire purchase price (3). Where the price is payable on a day certain, if all the conditions have been complied with on the part of the seller, the buyer can not by his own act diminish his obligation to pay the whole sum which he has promised (4). In Tufts v.

(1) Sales Act, sec. 63.

(2) 15 Wendell, 493.

(3) Dustan v. M'Andrew, 44 N. Y., 72, 78. Contra, Moody v. Brown, 34 Me., 107, and many states.

(4) White v. Solomon, 164 Mass., 516.

Burnley (5) a soda fountain was sold and the price was payable in instalments at stated times. The property was to pass upon the last payment. The fact that the property was destroyed before the maturity of some of the notes was held not to relieve the buyer from his obligation to pay the notes when due. "The seller had done all he was to do, except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay."

§ 110. **Action for damages for non-acceptance of the goods.** "1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. 2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. 3. Where there is an available market for the goods in question, the measure of damage is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. 4. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater dam-

(5) 66 Miss., 49.

ages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit which the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages'' (6).

These are well established rules of law. Whenever a suit is brought, founded upon a breach of contract, if the plaintiff is entitled to recover, he is ''so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed'' (7). See the article on Damages in Volume X of this work.

§ 111. Rescission of contract or sale. ''Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer'' (8).

When one of two parties to a contract repudiates all his obligations imposed thereby, the other party may refuse to go on with further performance (9). He has his action on the breach of contract, and, if he has partly performed, he may recover the value of what he has furnished to the other party (10).

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(6) Sales Act, sec. 64.

(7) Robinson v. Harman, 1 Ex., 155.

(8) Sales Act, sec. 65.

(9) Behn v. Burness, 3 B. & S., 751.

(10) Cort v. Ambergate Railway Co., 17 Q. B., 127; Derby v. Johnson, 21 Vt., 17.

SECTION 2. REMEDIES OF THE BUYER.

§ 112. Action for converting or detaining goods. "Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind wrongfully converted or withheld" (11).

The property in the goods being in the buyer, he may bring any possessory action against one who wrongfully deprives him of possession, whether it be the seller or anyone else; and he has his action against the seller for breach of contract to deliver the goods.

§ 113. Action for failing to deliver goods. "1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery. 2. The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. 3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver" (12).

Where the property in the goods has not passed to

(11) Sales Act, sec. 66.

(12) Sales Act, sec. 67.

the buyer, except in the few cases where specific performance is granted, an action against the seller for damages for breach of contract is his only remedy. The rules regarding the measure of damages in such actions are fully treated in the article on Damages in Volume X of this work.

§ 114. **Specific performance.** "Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as the court may deem just" (13).

A court of equity will never grant specific performance of a contract relating to personal property, if there is an adequate remedy at law by an action for damages. In exceptional cases, where money damages cannot be compensatory or where the damages cannot be measured in money, the equity court will decree that the person withholding the goods wrongfully shall deliver them to the person entitled to them, under the contract; e. g., works of art, property of value to the plaintiff for personal reasons, valuable papers, or goods that cannot be obtained elsewhere (14). For the doctrines of specific

(13) Sales Act, sec. 68.

(14) Lowther v. Lowther, 13 Vesey, 95; Wilkinson v. Stitt, 175 Mass., 581; Pattison v. Skillman, 34 N. J. Eq., 344; Adams v. Messinger, 147 Mass., 185.

performance of contracts, see Equity Jurisdiction, Chapter II, in Volume VI of this work.

§ 115. **Remedies for breach of warranty: Sales Act.** The remedies provided in the following section of the Sales Act are well established by the courts generally, in this country: "1. Where there is a breach of warranty by the seller, the buyer may, at his election: (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price. (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty. (c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty. (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. 2. When the buyer has claimed and has been granted a remedy in any one of these ways, no other remedy shall thereafter be granted. 3. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time when the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty,

such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale. 4. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price. 5. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section fifty-three (§95, above). 6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. 7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty'' (15).

§ 116. **Same: Option to reject or rely on warranty.** When goods of a certain description are sold, it is a

(15) Sales Act, sec. 69.

condition of the contract that the goods supplied shall correspond with the description. If the seller supplies goods of a different description or of an inferior quality, the buyer may reject the goods offered altogether; but he is not compelled to do so. If, upon examining the goods, he finds that they do not comply with the contract, he may, nevertheless, accept them and bring suit upon a breach of warranty, or, if an action is brought against him by the vendor for the price, he may prove the breach of warranty, either in diminution of damages or in answer to the action, if the goods are of no value (16). "There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty, some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found upon examination to be unsound, the purchaser must immediately return them to the vendor or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them, or receive them and rely upon the warranty, and that, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counter-claim for such dam-

(16) Poulton v. Lattimore, 9 B. & C., 259.

ages in an action brought by the vendor for the purchase price of the goods'' (17).

§ 117. **Same: After receipt of goods.** If the buyer, who has received the article, uses it and derives a benefit from it, he cannot thereafter rescind the contract, but is left to his action for damages for the breach of warranty (18). Where the buyer accepts the goods after a full and fair opportunity of inspection, he is, in the absence of fraud, estopped from thereafter raising objections as to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance is accompanied by some warranty of quality manifestly intended to survive acceptance (19). It is the better view that the buyer to whom the property has been delivered may rescind the contract for breach of warranty, by a seasonable return of the property, if it can be returned to the seller in the same state in which it was delivered to the buyer. It may be returned in a defective condition, if the defect is owing to the breach of warranty itself. In Smith v. Hale (20) a buggy was sold with a warranty that the springs were strong. One of the springs broke while the buggy was in the buyer's possession. It was held that the buyer might rescind the contract and return the buggy. ''The breaking of the spring was just what the plaintiff had warranted against.'' A number of states hold that there can be

(17) English v. Spokane Commission Co., 57 Fed. Rep., 451, 456; Day v. Pool, 52 N. Y., 416.

(18) Lyon v. Bertram, 20 How., 149.

(19) Studer v. Bleistein, 115 N. Y., 316.

(20) 158 Mass., 178.

no return of the goods for breach of warranty, in the absence of fraud (21).

§ 118. **Interest and special damages.** "Nothing in this act shall affect the right of the buyer or of the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed" (22). If, in addition to the difference between the value of the goods furnished and the value of the goods that the buyer was entitled to receive, the buyer suffers any special injury, as a consequence of the seller's default, he may be entitled to recover for this. In general he may recover damages that directly and naturally result, in the ordinary course of events, from the breach of warranty. What are such damages and the rules governing their ascertainment are discussed in the article on Damages in Volume X of this work.

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(21) Thornton v. Wynn, 12 Wheat. 183, 193; Brigg v. Hilton, 99 N. Y., 517, 529.

(22) Sales Act, sec. 70.

APPENDIX A.

CRIMINAL LAW.

§ 2. What are the sources of the criminal law?

§ 3. Suppose that Jones, in New York, there makes an assault on Bates, a United States customs inspector, in such a way that it amounts to a crime according to the law of New York. May Jones, merely on that showing, be punished as for a crime against the United States?

§ 4. A United States statute provides that the murder of any official of the United States is a crime against the United States, but it does not define what murder is. If Green killed Doane, a federal official, how could you tell whether or not he could be punished under this statute?

§ 7. A statute defined and punished grand larceny as the stealing of goods of the value of $10 or over. If a man stole goods of less than $10, could he be punished therefor?

§ 8. A statute of Illinois provides that all persons practicing as barbers in the state shall obtain a license from a state board. Allen was a citizen of Illinois and had been a barber there for ten years before the statute was passed. He claimed that as to him it was unconstitutional. Is his claim sound?

§ 10. A state statute provides that in the case of certain mentioned contagious diseases the sick person must call in a licensed physician. Gray is ill with one of the diseases mentioned, but, being an ardent Christian Scientist, refuses to call in a regular physician. May he be indicted for so refusing?

Would it make any difference in this case if Gray recovered and no one else was affected by the disease?

§§ 11, 13. Thorpe, having a grudge against Bates, went to Bates' pasture at night and killed a cow there which he thought was Bates'. In fact it was Thorpe's own cow. May Thorpe be indicted for malicious destruction of property?

§ 14. Lord was indicted for causing the death of one of his children, a helpless cripple, by starving it. He pleaded that he did

not do anything to the child, but simply let it alone. Is this a defense?

§ 15. Dale saw Hughes, a personal enemy of his, standing with his back toward a rapidly revolving cog wheel and with the wind blowing Hughes' coat tails toward the wheels. He purposely said nothing and Hughes' coat tails were drawn into the cogs and he was killed. Of what crime, if any, is Dale guilty?

§ 17. Kline was leaving the hospital after a severe operation. Jones, in a criminally negligent way, ran his automobile into him, throwing him down and causing his wound to reopen, from which he died. Is Jones liable for manslaughter?

§ 18. Is running a public gambling house a crime at common law?

§ 20. Smith committed an assault and battery on Todd. Todd sued him and recovered $20 damages. May Smith now be indicted for the same act and be fined $20.

§ 22. Gay and Jones robbed Cox. In dividing the loot a dispute arose and Gay knocked Jones down and broke his arm. May Gay be indicted for an assault and battery on Jones?

§ 24. Small, the chief of police, in order to get a conviction against Doe, gave Chase, a plain clothes man, the key to his (Small's) house and told him to get Doe in there on a pretended plan to steal. Chase persuaded Doe to take part in the plan and Doe was arrested in the house after having taken a watch. Is he guilty of larceny?

§ 25. What are the three classes of criminal offenses?

§ 27. Olsen, by a trick obtained possession of Jay's watch. The next day Jay met Olsen on the street, and to regain his watch, knocked Olsen down and took a watch from him. Jay acted in good faith and believed that the watch that he took back was his own; in fact it was Olsen's. Is Jay guilty of robbery?

§ 28. A statute forbade the removal of a body from a grave yard without the consent of the authorities. A son, without getting the consent of the authorities, removed the body of his mother because he wished her to be buried in consecrated ground. Is he guilty under the statute?

§ 29. What are the various kinds of criminal intent that are sufficient to render a man responsible for his criminal acts?

§ 31. Holt intended to steal King's horse. By mistake he took White's. May he be indicted for the larceny of White's horse?

§ 32. Rourke was erecting a building in such a way that it encroached on the highway, thus amounting to a public nuisance. While so engaged he dropped a brick from the building and killed Barnes,

a passerby. He was not negligent in dropping it. May he be indicted for manslaughter?

§ 34. Gould, believing himself locked out of his house broke a window and so got in. After he was in he found that he was in the wrong house, but stayed there and stole a watch. Is he guilty of criminally breaking and entering?

§ 36. An abutter is indicted for putting his building six inches over the street line as established by statute. He pleads that he did not know that he was over the line. Is this a defense?

§ 37. Hatch cut a horse's leg to prevent him from running in a race. The horse died from the wound and Hatch was indicted for cutting the horse with intent to kill. May he be convicted under this indictment?

§ 38. Defendant is indicted for assault with intent to kill. He shot at Hill but missed him and hit Dodd. May he be convicted?

Defendant is indicted for an assault on Smith with intent to do him malicious injury. He threw a stone at Smith's horse, intending to maliciously injure the horse and it struck Smith. May he be convicted?

§ 39. May a corporation be indicted for perjury?

§ 42. Dale pointed a pistol at Hull and said "If you don't kill Colt, I will kill you." Hull was so situated that he could not get at Dale and to save his own life killed Colt. Is he guilty of homicide?

§ 45. A street car conductor honestly believing that a passenger had not paid his fare put him off the car, as he would have had a right to do if he had really not paid. In fact the passenger had paid his fare. Is the conductor indictable for assault and battery?

§ 46. Fox is indicted for *maliciously* setting fire to grass. The grass was on town land and Fox thought that he had a right to burn it, though in reality he did not. May he be convicted?

§ 49. Davis, while intoxicated made an attack on Balch. He would not have done so if he had not been drunk. Is this fact an excuse?

Green, while intoxicated kills Hart. He is indicted for killing with malice aforethought. Can he avail himself of his drunkenness in any way as a defense?

§ 52. Thomas is so diseased mentally that he kills Holt, being driven thereto by an insane impulse which he cannot resist although he knows that the act is morally and legally wrong. Is he criminally responsible?

§ 54. Fair urges Dale to burn Todd's house and offers him $100

to do so. Dale refuses and Fair then gives up the idea. Is Fair guilty of a crime?

§ 56. The members of a labor union in order to aid another labor union which is on a strike, agree not to trade with or work for any man who trades with the employer against whom the strike is directed. Are the members making the agreement guilty of a criminal offense?

§ 57. Young points a loaded gun at James and pulls the trigger with the intent of killing him. The cartridge has a defective cap and does not explode. Is Young guilty of an attempt to commit murder?

§ 59. Thayer gave Mrs. Barnes, a nervous woman, some harmless white powder and after she had swallowed it told her that it was arsenic, intending to frighten her. This so affected her that she became seriously ill. Is Thayer guilty of a crime?

§ 63. Hill sees Vale approaching him in a threatening manner and reasonably believes his life is in danger. Under this belief he draws a pistol and kills Vale. In fact Vale was not going to attack Hill at all. Is this justifiable self-defense?

§ 63. How would it affect the question if Hill's belief though honest, was unreasonable?

How would it affect the question if Hill could have in safety retreated to his house?

§ 65. A bunco man met a farmer in the city and swindled him out of $50. Six months later the victim was in the city again and met the swindler and demanded his money. Upon the swindler's refusing to give it to him the farmer knocked him down and went through his clothes to see if he had $50. Is the farmer guilty of assault and battery?

§§ 69, 70. In pursuance of a plan to rob a house, Allen killed the watch dog, Barnes pried open the window with a jimmy, Chase entered and collected the goods and handed them out of the window to Dole, Evarts stayed a hundred yards down the road to watch for the police and Finch was ready with an automobile to carry the thieves away in case the police appeared. What is the relation of each to the crime?

§ 72. An escaping felon went into a restaurant and ate his dinner. The restaurant keeper knew that he was a felon and wanted for a crime. Is the restaurant keeper liable as an accessory after the fact?

§ 73. Todd and Gay planned to rob a house, Gay staying out-

side to guard. Todd entered the house and after robbing, raped one of the inmates. Is Gay liable as a party to the rape?

§ 77. White in New York, by means of the mails sold fake mining stock in San Francisco in such a way that if it had all been done in either New York or California he could have been punished there. On the facts as given may he be punished in California for obtaining money by false pretenses?

§ 78. Ewing in Illinois, shoots across the line and hits Bird in Indiana and Bird goes into Ohio and there dies from the wound. Where should Ewing be punished?

§ 81. Arnold met Olsen on the street at noon, drew a revolver, pointed it at Olsen's head and said: "If it were only night I would blow your brains out." Is Arnold guilty of an assault?

§ 88. Abbot has intercourse with Mrs. Blake, a married woman, by deceiving her into believing that he (Abbot) is her husband. Is Abbot guilty of rape?

§ 94. Stearns was Hill's employee and was working with him on the third floor of a partially completed building. Hill told Stearns to hand him a hammer. Stearns refused, whereupon Hill kicked him off the building. Stearns fell to the ground and sustained internal injuries from which he died. Is Hill guilty of murder or manslaughter?

§ 96. Yoe sees Todd and White fighting. To stop them he rushes up silently and seizes Todd around the waist; and Todd thereupon strikes him a violent blow from which he dies. Of what homicidal crime is Todd guilty?

§ 97. Lynch, while engaged in a felonious attempt to rob Crane's safe set off a charge of powder to blow it open. Thayer, a bystander unknown to Lynch, was unexpectedly killed by the explosion. Of what homicidal crime is Lynch guilty?

§ 100. Dart detects Carr in adultery with Dart's wife and because thereof intentionally kills him on the spot. Of what homicidal crime is Dart guilty?

§ 102. If Dart in the above case had waited two months and then killed Carr, of what homicidal crime would Dart have been guilty?

§ 103. Hart as a joke put into Finch's coffee powder from a bottle marked "Poison" but which he believed contained sedlitz powder. Finch was killed by the poison. Of what homicidal crime is Hart guilty?

§ 105. What is the difference between direct and circumstantial evidence in cases of murder?

§ 109. May broke and entered the house of Hale in the night time with the intent to steal a particular book whose value was so

small that the stealing of it would be only a misdemeanor. Is he guilty of burglary?

§ 110. White disguised himself as a telephone inspector and thereby procured entrance to a house to rob. Is he guilty of breaking and entering with intent to commit a felony?

§ 111. Murphy stretched his hand through a window into Vose's house to pick up a watch lying on the window sill, but knocked it off on the floor. Is he guilty of burglary?

Young squirted some acid into a room onto a silver dish on the sideboard, intending, if it stood the acid, to reach in and steal it. Is this a sufficient entry to constitute burglary?

§ 113. If the owner of a flat building who occupied one flat entered another at night by means of his pass key with intent to commit rape, would he be guilty of burglary?

§ 117. Hare lighted a bunch of shavings and held it against Bolt's house to burn it; the paint was cracked and blistered by the heat. Is that enough to constitute arson?

§ 118. Smith had a patent fire extinguisher that he wanted to try. He set fire to Doe's house and turned the extinguisher on it, believing that he would at once put out the fire. The extinguisher did not work. Is he guilty of arson?

§ 122. Mill sent two servants each with a horse to sell at a county fair. One servant ran away with the horse entrusted to him and kept him for his own. The other followed his master's instructions and sold the horse entrusted to him, but ran away with the money. Which was guilty of larceny and which of embezzlement?

§ 123. Suppose the second servant in the last question had brought the money back home and put it on his employer's desk while the latter was out and then later in the day had gone in again and taken it. Would he have been guilty of larceny?

§ 124. Young held a promissory note of Gould. When it came due he went to Gould to collect. Gould said, "Let me see the note a minute. I want to be sure it is the same one that I gave you." Young handed it to Gould, who thereupon kept it and refused to give it back. Does this amount to larceny?

§ 125. Dane asked Ellis to lend him a dollar. Ellis gave him what they both supposed was a one-dollar bill. Dane later found out that it was a $10 bill and kept it for his own. Is he guilty of larceny?

§ 126. Strong found a pocket book on the road that he recognized as belonging to Fish. He picked it up, intending to return it to him. Later he decided to keep it and did so. Is he guilty of larceny?

Suppose when he picked it up he had not known whose it was and

had determined to keep it for his own and had later found that it was Fish's and still kept it. Would this have been larceny?

§ 127. A messenger boy is given a box containing a pair of shoes. After he has started in good faith he makes up his mind to keep the shoes and opens the box and takes them out and delivers the empty box. Is he guilty of larceny?

§ 128. A bunco man in company with Smith pretended to find a valuable ring. The bunco man stated that the ring was worth $100, and then said to Smith, "Let me have your watch as security that you will meet me tomorrow and you can keep the ring over night." Smith agreed and gave him his watch on that understanding. The bunco man kept it and disappeared. Was he guilty of larceny or obtaining property by false pretenses?

Suppose in the above case that the bunco man had stated that the ring was worth $100, but that he would sell Smith his interest for $35 and Smith had paid him the money for a brass ring. Of what crime would the bunco man be guilty?

§ 130. A thief determined to steal a barrel of apples. He first put the barrel down on its side, put his foot against it, rolled it six feet and stooped to end it up again when he was detected and fled. Was he guilty of larceny, and if so, at what moment?

§ 132. Suppose the barrel had been filled with pig iron, so that when the thief tried to tip it over he couldn't move it. Would he be guilty of larceny?

§ 133. Glen cuts some standing timber on Green's land and at once carries off the logs. Is he guilty of larceny?

Suppose he had left the logs there for six weeks until there should be sufficient water to float them away and then had removed them. Would he be guilty of larceny?

§ 134. Is it larceny to steal a cat?

§135. Thomas went to a garage in a city and said that he wanted to hire an automobile to go to one of the suburbs about 5 miles away. In fact, he intended to go to another city about 50 miles away. After he had got the automobile he kept it for his own and sold it. Is he guilty of larceny?

§ 136. Guild took some tickets from a railroad station and used them in getting a ride to a neighboring town. It was urged that he was not guilty of larceny because he did not keep them, but restored them to the railroad company in the person of its agent, the conductor. Is the argument sound?

§ 138. Curtis took a letter from Doe's desk in order to copy the signature of the writer and later to forge it. Being afraid of de-

tection if he endeavored to return the letter he then destroyed it. Is he guilty of larceny?

§ 142. A highwayman met Fox, pointed a pistol at him and said "Drop that bundle." Fox did so and then fled. After he had gone the highwayman picked up the bundle. Is this robbery or larceny?

§ 144. Small runs a lodging house and goes into the room of Hall, a lodger, and takes therefrom a watch. Is this simple larceny or larceny from the house?

§ 145. What is the general difference between larceny and embezzlement?

§ 146. The police believed that Hill was acting as a receiver of stolen goods. Smith had some property stolen from him by Young. The police got hold of Young and recovered the goods; then, with Smith's consent, in order to catch Hill they returned the goods to Young and told him to take them to Hill. Young did so and Hill took the goods. He was then arrested on the charge of receiving stolen goods. Can the charge be sustained on these facts?

Suppose Young had been the agent of Smith, who had given him the possession of the goods for some purpose and that Young had then converted them to his own use and taken them to Hill as before Would Hill have been guilty of receiving stolen goods?

§ 149. A robber, in order to get Thayer out of the way so that he might rob the latter's house, wrote Thayer a note in the writing of Thayer's wife and signed with her name, stating that she had been seriously hurt and asking Thayer to come at once. Is this forgery on the part of the robber?

§ 150. John Smith executed a promissory note and signed it thus: "James Brown per John Smith." In fact, he had no authority to sign Brown's name and knew that he did not have. Is he guilty of forgery?

§ 154. Robert and Walter Allen were twin brothers. Robert knew that John Smith owed Walter money. He went to Smith, called himself Walter and said that he had come to collect his claim. Smith was just on the point of paying when he recognized that the man before him was Robert and not Walter. In order to convict Robert he went ahead and paid him. May Robert be indicted for obtaining money under false pretenses?

§ 155. Holt sold a typewriter to Gay. Gay bought it because Holt said it was as fine a typewriter as a man could ask for. In fact it was practically useless. Is Holt criminally liable?

§ 157. Todd dropped a slug instead of a nickel in a public tele-

phone and thereby got the connection that he wanted. Is he guilty of obtaining under false pretences?

§ 163. A dozen men get together and try to break up a mass meeting. Of what crime, if any, are they guilty?

§ 166. Fales, under the honest but erroneous belief that Jenny, his first wife is dead, marries Lucy. Is he guilty of bigamy?

§ 171. May a woman who has been a prostitute be seduced so that the seducer will be criminally liable?

§ 174. Young was indicted for a nuisance in running a boiler factory in the middle of a residence district. He pleaded (1) that he ran it in the quietest way possible; (2) that he had been there for a long time and the place had only gradually grown up into a residence district. Are the pleas, or either of them, valid?

§ 178. A jailer does not confine a prisoner in his cell at night, as required by statute, because the prisoner is a friend of his and he knows he will not try to escape. Of what crime, if any, is the jailer guilty?

§ 180. A person who was arrested, believing that the officer had power to make the judge discharge him, offered him $10 so to do. In fact, the officer had no such power. Is the prisoner guilty of bribery?

APPENDIX B

CRIMINAL PROCEDURE.

§ 2. A police officer steps up to White while walking along the street and says, "You are under arrest." White asks, "What for?" and the officer says, "None of your business," whereupon White knocks him down and escapes. May he be indicted for unlawfully resisting arrest?

§ 4. By statute in many states it is a felony for a person to knowingly convey land to one person which he has already conveyed to another. Starr violates this statute and Dole discovers that he has just done so. May Dole arrest Starr without a warrant?

§ 5. Nolan, as he runs rapidly by James, attempts to snatch James' purse, but misses it. This is a misdemeanor. May he be arrested without a warrant?

§ 6. May a person be arrested without warrant where he is conducting a slaughter house in such a way as to amount to a public nuisance?

§ 8. North was arrested by an officer without a warrant while engaged in an assault on Hall. He was at once taken before a police judge, put on trial and sentenced to pay a fine. Is the sentence legal?

§ 10. A warrant purported to be for the arrest "of the person or persons who on July 10, 1909, committed assault on John Smith in the City of Chicago, County of Cook and State of Illinois." Under this warrant West, Young and Jones were arrested by the officer. Is the warrant good?

§ 11. Suppose the warrant in the last question had read thus: "John Doe and Richard Roe, being the persons who," etc., "whose names are unknown," would the warrant have been good?

§ 14. Has a person who fears indictment by the grand jury the right to appear before it in person or by attorney?

§ 18. An indictment alleged that the defendant "on July 10, 1909," committed burglary. The evidence showed that it was committed on the morning of July 11, 1909. Should the defentdant be discharged?

§ 20. The defendant was indicted for stealing "a pine log marked X L C." At the trial it was proved that it was marked "T L C." Should the defendant be discharged?

§§ 23, 26. What is the difference between an information and a criminal complaint?

§ 27. Is it necessary that a person should always be arrested before he may be tried criminally?

§ 29. A criminal complaint was supported by an affidavit that the affiant was credibly informed and honestly believed that the prisoner had committed the offense charged. Is the affidavit sufficient?

§ 30. What must a person do and swear to in order to obtain a search warrant?

§ 32. May a wife ever testify against her husband?

§ 34. If the assassin of President McKinley had escaped to England, could he have been extradited?

§ 35. What are the requisites for a proper legal demand for the interstate extradition of a criminal?

§ 37. Smith in Illinois wrote a swindling letter to Barnes in Indiana and by means thereof induced Barnes to give to Colt in Indiana certain money which Colt then brought to Smith in Illinois. Colt was innocent of any criminal intent. Smith was indicted in Indiana for obtaining money by false pretences. May he be extradited from Illinois to Indiana?

Suppose later on, after the facts of the last question, that Smith came into Indiana and there swindled Dale and then went to Kentucky, not to avoid arrest, but to buy land. Could he be extradited from Kentucky to Indiana as a "fugitive from justice?"

§ 39. Suppose that on the facts of the last question Smith was extradited from Kentucky to Indiana, could he then also be tried for the Illinois-Indiana swindle?

§ 40. Suppose Kentucky refused to extradite Smith and an Indiana officer went to Kentucky and forcibly brought him back to Indiana without any authorization from Kentucky, would Smith be entitled to be discharged in Indiana?

§ 42. Lane is arrested for petty larceny and his bail is fixed at $5,000. What relief has he?

§ 44. Hill is arrested but has not yet been indicted or brought before a magistrate. May he demand that he be allowed to see a lawyer?

§ 52. Defendant's case came on for trial at the last week of the court. The prosecution had put only one witness on when the term

of court expired and the trial dropped. May a new trial be begun at the next term of court?

§ 52. Defendant was tried on an indictment that charged him with (1) the murder of Taylor; (2) assault on Taylor with intent to kill; (3) simple assault. He was acquitted on 1 and 2 and convicted on 3. He asked for and obtained a new trial. May he be tried again on counts 1 and 2?

§ 53. White is indicted for obtaining a certain specified watch from James Smith by false pretences. He is acquitted. May he now be indicted for larceny of the same watch from the same James Smith?

§ 65. Gray was indicted for murder. At the trial he did not go on the stand as a witness to explain the circumstances that were apparently against him. The prosecuting attorney argued that this was practically a confession of guilt. Did he have the right so to do?

§ 67. Brown was indicted for murder in the first degree. The jury are in doubt whether he committed murder in the first or second degree. What should be the verdict?

§ 68. The defendant in his trial pleaded an alibi. When the evidence was all in the jury returned a verdict that in their minds the evidence was just evenly balanced as to whether the defendant was or was not at the place of the crime. On such a verdict should he be discharged or convicted?

§ 70. Murphy is being tried for murder and in open court declares, "I am guilty of the crime." What further steps, if any, must the state take before he can be convicted?

§ 72. During the trial of a criminal case the judge remarked when one of the witnesses had finished his statement: "That fellow looks like a liar." What right has the defendant as a result of this action?

§ 74. During the argument of a case to the jury the prosecuting attorney said that the witnesses of the defendant looked like a lot of rascals and he wouldn't believe them under oath. Was this a proper argument?

§ 84. If a man was just on the point of being hanged and new evidence was found and he could not find the governor to get a reprieve from him, what other step could he take?

Ladd is sentenced to imprisonment for 10 years and the governor grants him a reprieve of 6 weeks. At the end of that time must he be re-sentenced?

APPENDIX C.

SALES.

§ 1. What is the purpose and scope of the "Sales Act?"

§ 2. Doane says to Winslow, "I will sell you my horse and buggy for $150, when you have a stable large enough to accommodate them." Winslow says, "I accept your offer." Does this amount to a sale of the horse and buggy?

If not what is its legal effect?

§§ 14, 15, 16. Brown, a dealer in shoes, telephoned Green, a shoe manufacturer on a small scale, and said to him, "I want you to ship me at once 500 pairs of your shoes, style 'XX,' in assorted sizes." Green said, "That is one of our stock patterns, but I haven't any made up now, but I can make them for $500 and ship them to you in a week if that will be satisfactory." Brown said. "All right." Green made the shoes and Brown then refused to take them and when he was sued set up that the contract was not in writing. Is his defense good (a) in states that follow the English rule; (b) in states that follow the Massachusetts rule; (c) in states that follow the New York rule?

§ 18. Gordon, the owner of a farm, made the following oral sales: To Hill, a crop of wheat that was just ready to be cut; to Jones, all the blueberries growing in his pasture lot to be picked within a week; to Kline, 50 feet of standing timber; and to Lane, 100 feet of cut timber. In no case did the value of the sale exceed the sum fixed by the statute of Frauds. On which sales may action be maintained if the purchasers refuse to perform?

§ 21. Gale told Thayer that he would become surety for White for any sales that Thayer made to White. Thayer sold to White $1,000 worth of goods, there being no memorandum or other compliance with the statute of Frauds. White was unable to pay, and Thayer then sued Gale on his contract. Gale set up the defense that there was never any contract with White because it was not in writing. Is this defense open to Gale?

§ 23. Baker was trying to sell Gates his auto. He showed it to the latter as it stood in the garage. Gates looked it over and then

Baker said: "Make me an offer." Gates said: "I'll give you $350 for it." Baker said, "It's yours" and Gates said, "All right." The next day Gates told Baker that he had decided to call the deal off. May Baker hold him for the sale?

§§ 25, 26. Doane had been negotiating with Fish for the purchase of Fish's horse and had finally agreed on the price of $150. Then Doane refused to take the horse and finally wrote Fish as follows: "This is to notify you that I am not going to take your horse as agreed upon for $150." Fish then sued Doane and relied on the above letter as a memorandum of the sale. May he so do and is it a defense that the letter was not also signed by Fish?

§ 28. Brown sold White a bill of goods and drew up a memorandum of the sale which he signed. He offered it to White to sign, just as the latter was leaving and he said: "You sign it for me." Brown signed "White per Brown." Is this a sufficient memorandum to hold White?

§ 29. May a person make a valid sale of growing grain on a field that he does not own but expects to purchase in a few days?

§ 31. Suppose the seller in the last case did actually acquire title to the field a few days later, what effect would that have on the right of the purchaser of the grain?

§ 33. Wolf, a member of a stock exchange sells to Lamb, another member 100,000 bushels of wheat at 60 cents a bushel to be delivered in 30 days; Wolf, at the time having no wheat. Is this sale illegal?

Would it make any difference if neither Wolf nor Lamb ever intended to actually deliver or receive the wheat?

§ 34. What is the difference in the legal rights of a person who buys a one-third interest in an auto and a person who buys one-third of a mass of 6,000 bushels of grain?

§ 35. Bates, a storekeeper, sold out his entire stock to Gray for $15,000, the title to pass July 1st, Bates remaining in possession till then. June 30, a fire destroyed about one-third of the stock and damaged the rest. What are the respective rights and obligations of Bates and Gray?

§ 37. A man went into a grocery store and said: "Send me a bushel of potatoes." The grocer did so. What price could he collect from the purchaser?

§ 39. Dale ordered a set of Stevenson's Works from a bookseller stating that it must be the "Thistle Edition." The bookseller replied: "I'll sell you the Thistle Edition for $40 and I will guarantee that it is bound in Morocco." Dale paid $40. When he

received the books he found them bound in cloth. May he rescind the sale and recover his money?

What would have been his right if it had been bound in Morocco but had not been the "Thistle Edition?"

§ 42. Howe bought a horse from a dealer who guaranteed him to be gentle and fit for ladies to drive. While Howe was trying him before the sale the horse snapped at him twice, and became frightened at a train. May Howe later recover from the dealer on his warranty if it turns out that the horse is not gentle or fit for ladies to drive?

§ 44. Smith bought a suit of clothes, the clothier guaranteeing that they should fit Smith to his satisfaction. They did not do so. May he be compelled to pay for them?

Would it make any difference that the clothes would have suited the average man?

§§ 45, 46. Green saw a horse in Stone's possession and offered him $75 for the animal which Stone accepted and delivered the horse. Later the horse was taken from Green by Hatch who was the true owner. May Green recover from Stone for breach of warranty of title?

Would it make any difference if at the time of the sale from Stone to Green the horse had been in possession of Murphy, a stablekeeper?

Would it make any difference if Stone sold the horse by virtue of a mortgage of it which he had from Reed?

§ 50. Dale wrote to a tire manufacturing company telling them to send him four tires for an auto race. The company sent the tires and in the race one of them burst because of the defect in the rubber, thereby damaging the car. May Dale recover from the company for the damage?

§ 53. Under what circumstances would the company in the last case still be liable even though the purchaser had examined the tires?

§§ 57a, 59. Hill made Jones, a farmer, an offer of $17 a ton for all the hay then in his barns. Jones accepted the offer. The same night the barns and contents were destroyed. On whom does the loss fall?

§ 60. Would it make any difference in the last case if it had been agreed that Hill was to weigh the hay and see how many tons there were?

§ 61. Mrs. Brown went to a linen shop and told the shopkeeper to send out a tablecloth "on approval." He sent out a cloth which

Mrs. Brown kept for 3 weeks, used twice and spotted with coffee. She then sent it back on the ground that it was not satisfactory. May the shopkeeper hold her for the price?

§ 68. White ordered from Jones, in Chicago, a dozen typewriters, price to be charged. Jones wrote: "Order received and will ship at once." Jones delivered the typewriters to the railroad, but in the bill of lading named himself as consignee, and kept the bill of lading. While the goods were on the way to White, Jones stopped them and sold them to Lewis. What are the rights of White (1) against Jones (2) against Lewis?

§ 71. Adams stepped into an auction room. There was a picture up for sale and a bid of $15 had just been made. Adams bid $17. No higher bid was received and the auctioneer said he would withdraw the picture. May Adams get it on tendering the $17?

§ 74. Gale was riding with Smith in Smith's auto though Gale was running it. They met Brown who said to Gale, "I've got a chance to sell an auto like this one of yours and if you want to take $750 for it cash, I'll give you that for it." Gale said "It's yours, I'll run it up to your house now." Brown gave him a check for $750 which he cashed and then turned over the machine to Brown, Smith saying nothing. Brown sold it to Paine for $1,000; and the next day Smith claimed the auto from Paine. May he recover it?

§ 80. Pond ordered 30 bales of hay from Bell who shipped them by freight and sent the bill of lading to Pond who was named as consignee. The same day Pond assigned the bill of lading to Todd who paid him for the hay. The next day Bell learned that Pond was insolvent and stopped the hay on the way. May Todd compel Bell to let him have the hay?

§ 84. Fox was a lumber dealer with his lumber yard in Wisconsin. Gould wrote him from Chicago asking the price of 10,000 feet of lumber and Fox told him a certain sum. Gould ordered 10,000 feet at that price. Who must pay for getting the lumber to Chicago?

§ 85. Clark, in New York, bought of Small, in Iowa, 5,000 bushels of potatoes to be delivered in New York. Small shipped 4,000 bushels which Clark accepted. What is his liability to Small?

§ 88. Davis ordered 500 tons of coal from Evarts specifying that it should be free burning and with no clinkers or cinders. The coal was delivered to Davis who, to see if it came up to the specifications, burned a half a ton of it. It left clinkers and cinders and he refused to accept it. Is he liable for the half ton burned?

§ 90. Suppose that in the last case Davis had kept the coal although it was not up to specifications, could he have collected damages for the failure to deliver the kind ordered?

§ 91. Suppose he had declined to take the coal at all because of its inferior quality, who would have to pay for removing it?

§ 94. Dale owed Kline $500 for goods purchased and gave Kline his note for $500 payable in 30 days at 6%. When it came due, Dale could not meet it. May Kline sue on the original claim for $500 or only on the note?

§ 99. Barnes sold $1000 worth of potatoes to Colt on 90 days credit and shipped them to him. Just after they were shipped he discovered that Colt had gone into bankruptcy. May he reclaim the goods from the railroad and hold them until paid cash?

§ 105. Suppose that after Barnes had stopped the potatoes in transit, on the facts in the last question, he had found that they were spoiling and to prevent loss had sold them to Hicks for $900. What would be the right of Colt (1) against Hicks (2) against Barnes?

§§ 108, 109. Young sold a printing press to White. On the days set for delivery, Young tendered the press to White who refused to receive it. Is Young limited to an action for damages for breach of contract or may he sue for the price of the press?

§ 111. Would Young, on the facts stated in the last question, be justified in rescinding the sale?

§ 116. Wood bought 100 barrels of whiskey from Adams, it being agreed that the whiskey was to be of the same grade as a sample shown Wood. When delivered the whiskey was found to be of an inferior grade. Wood kept and used it after notifying Adams of its inferiority. May he sue Adams for breach of warranty?

§ 117. On the facts stated in the last case, could Wood rescind the contract?